



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XC498

Takes of Marine Mammals Incidental to Specified Activities; Demolition and Construction Activities of the Children's Pool Lifeguard Station at La Jolla, California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of an Incidental Take Authorization (ITA).

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the City of San Diego to take small numbers of three species of marine mammals, by Level B harassment, incidental to demolition and construction activities of the Children's Pool Lifeguard Station in La Jolla, California, June to December 2013.

DATES: Effective June 28, 2013, through June 27, 2014.

ADDRESSES: A copy of the final IHA and application are available by writing to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910 or by telephoning the contacts listed here.

A copy of the IHA application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the

contact listed below (see FOR FURTHER INFORMATION CONTACT), or visiting the Internet at:

<http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301-427-8401.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 101(a)(5)(D) of the MMPA, as amended (16 U.S.C. 1371 (a)(5)(D)), directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for the incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of such takings. NMFS has defined "negligible impact" in 50 CFR 216.103 as "...an impact resulting from the specified activity that

cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS's review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

16 U.S.C. 1362(18).

#### Summary of Request

On December 3, 2012, NMFS received an application from the City of San Diego, Engineering and Capital Projects Department, requesting an IHA. A revised IHA application was submitted on April 1, 2013. The requested IHA would authorize the take, by Level B (behavioral) harassment, of small numbers of Pacific harbor seals (Phoca vitulina richardii), California sea lions (Zalophus californianus), and northern elephant seals (Mirounga angustirostris) incidental to demolition and construction

activities of the Children's Pool Lifeguard Station at La Jolla, California. The demolition and construction operations are planned to take place during June to December 2013 in La Jolla, California. On May 3, 2013, NMFS published a notice in the Federal Register (78 FR 25958) making preliminary determinations and proposing to issue an IHA. The notice initiated a 30-day public comment period. Additional information on the demolition and construction activities at the Children's Pool Lifeguard Station is contained in the application, which is available upon request (see ADDRESSES).

#### Description of the Specified Activity

The Children's Pool was created in 1931 by building a breakwater wall which created a protected pool for swimming. This pool has partially filled with sand, but still has open water for swimming, as well as a beach for sunbathing and walking. The Children's Pool and nearby shore areas are used by swimmers, sunbathers, SCUBA divers and snorkelers, shore/surf fishermen, school classrooms, tide pool explorers, kayakers, surfers, boogie and skim boarders, seal, bird and nature waters as well as other activities by the general public. Over the last three years (2010 through 2012), an average of 1,556,184 people have visited the Children's Pool and lifeguards have taken an average of 8,147 preventive actions and 86 water rescues annually (CASA, 2010; 2011; 2012). The existing lifeguard facility was built in 1967, it is old, deteriorating from saltwater intrusion, and no longer serves neither the needs of the lifeguard staff nor the beach-going public. The structure was condemned on February 22, 2008 due to its deteriorated conditions and the lack of structural integrity; therefore, it can no longer be used in its current state. Since the existing building is no longer viable, a temporary lifeguard tower was moved in, but because of basic year-round working condition needs

for the lifeguards and the demand for lifeguard services, a new station is required. The project includes the demolition of the existing lifeguard station and construction of a new, three-story, lifeguard station on the same site. The new facility will have an observation tower, first aid room, male/female locker rooms, and a second observation/ready room area, an accessible ramp to the new unisex public restrooms on the lower floor, a public viewing area, and a plaza in front of the lifeguard station. The new lifeguard station facilities will provide a 270° view of beaches, bluffs, and reefs for continued service to the public onshore as well as in the water.

Sound levels during all phases of the project will not exceed 110 dB re 20  $\mu$ Pa at five feet from the sound sources. The 110 dB estimate is based on equipment manufacturers estimates obtained by the construction contractor. The City of San Diego utilized the published manufacturers data based on the planned equipment (i.e., a 980 Case backhoe, dump truck, air compressor, electric screw guns, jackhammer, concrete saw, and chop saws) to be utilized on the project site. Operation of the equipment is the primary activity within the demolition and construction of activities that is likely to affect marine mammals by potentially exposing them to in-air (i.e., airborne or sub-aerial) noise. Generally, harbor seals are considered skittish and have the tendency to react or flush into the water at low levels of sound and/or movements. While a range of behavioral responses can be expected, it is difficult to predict what activities might cause noticeable behavioral reactions with Pacific harbor seals at this site. Children's Pool is a highly disturbed haul-out site and rookery, and the harbor seals observed at this location are unusually tolerant to the presence of humans, and do not respond in the same manner when exposed to stimuli (e.g., laughing, clapping, stomping, climbing, snorkeling,

swimming, wading, traffic, sirens, barking dogs, and road construction) when compared to the behavior of other harbor seals in other “non-urbanized” areas (Yochem and Stewart, 1998; Hanan & Associates, 2004; 2011; Hanan, 2005) (see <http://www.youtube.com/watch?v=4IRUYVTULsg>). During the working day, the City of San Diego estimates there will be sound source levels above 90 dB re 20  $\mu$ Pa during 106 days, including 27 days of 100 to 110 dB re 20  $\mu$ Pa at the demolition and construction site. The contractor used published or manufacturer’s measurements to estimate sound levels. On average, pinnipeds will be about 30.5 meters (m) (100 feet [ft]) or more from the construction site with a potential minimum of about 15.2 m (50 ft) and a peak of about 83 dB re 20  $\mu$ Pa at the mean hauling-out distance (30.5 m). The City of San Diego used the formula and online calculator on the website: <http://sengpielaudio.com/calculator-distance.htm> and measured distances from the sound source to determine the area of potential impacts from in-air sound. No studies of ambient sound levels have been conducted at the Children’s Pool, the City of San Diego intends to measure in-air background noise levels in the days immediately prior to, during, and after the demolition and construction activities.

The existing lifeguard station is located on a bluff above Children’s Pool (32° 50’ 50.02” North, 117° 16’ 42.8” West) nearby reef and beach areas (see detailed maps and photographs on pages 30 to 31 of the “Mitigated Negative Declaration” in the IHA application). The building has deteriorated significantly and must be removed. A backhoe will be used for demolishing the existing structure, and materials will be loaded into dump trucks to be hauled offsite. Material will be hauled to a local landfill where it will be separated into recycled content and waste. In its place, a new lifeguard station is

scheduled to be constructed within and adjacent to the existing facility. The new three-story, building will contain beach access level public restrooms and showers, lifeguard lockers, and sewage pump room; second level containing two work stations, ready/observation room, kitchenette, restroom, and first aid station; and third “observation” level will include a single occupancy observation space, radio storage closet, and exterior catwalk. Interior stairs will link the floors. The existing below grade retaining walls will remain in place and new retaining walls will be constructed for a ramp from street level to the lower level for emergency vehicle beach access and pedestrian access to the lower level restrooms and showers. A 5.6 m (18.5 ft) wall would be located along the north end of the lower level. The walls would be designed for a minimum design life of 50 years and would not be undermined from ongoing coastal erosion. The walls would not be readily viewed from Coast Boulevard, the public sidewalks or the surrounding community.

Lower level improvements include new beach access restrooms and showers, lifeguard lockers, and a sewage pump room. The plaza level plan includes two work stations, a ready/observation room, kitchenette, restroom and first aid station. The observation level includes a single occupancy observation space, radio storage closet, and exterior catwalk. The existing plaza would be reconfigured to provide a 3.1 m (10 ft) wide ramp for emergency vehicles to the beach and for pedestrians to the lower level accessible restrooms and showers. Enhanced paving, seating and viewing space, drinking fountains, adapted landscaping and water efficient irrigation is also included. No material is expected to enter or be washed into the marine environment that may affect water quality, as the City of San Diego has developed the U.S. Environmental Protection

Agency's National Pollutant Discharge Elimination System and the Stormwater Pollution Prevention Plan, required for the demolition and construction activities.

Demolition and construction of the new lifeguard station is estimated to take approximately 7 months (148 actual demolition and construction days) and be completed by December 15, 2013. Demolition and construction activities will occur Monday through Friday (no work will occur on holidays) during daylight hours only, as stipulated in the "Mitigated Negative Declaration" and local ordinances. Demolition and construction activities are divided into phases:

- (1.) Mobilization and temporary facilities;
- (2.) Demolition and site clearing;
- (3.) Site preparation and utilities;
- (4.) Building foundation;
- (5.) Building shell;
- (6.) Building exterior;
- (7.) Building interior;
- (8.) Site improvements; and
- (9.) Final inspection and demobilization.

Detail summary (phases overlap in time):

- (1.) Mobilization and temporary facilities:

Install – temporary perimeter fencing, temporary utilities and foundation, temporary life guard tower, temporary office trailer, temporary sanitary facilities, and temporary sound wall/visual barrier.

Equipment – truck, backhoe, trailer, small auger, hand/power tools, and concrete truck.



Timeframe – Approximately 12 days.

(2.) Demolition and site clearing:

Dismantle and remove existing station, remove hardscape and landscape, trucks expected to haul-off less than 5 loads of debris via Coast Boulevard.

Equipment – excavator, hydraulic ram, jackhammer, trucks, and hand/power tools.

Timeframe – Approximately 13 days.

(3.) Site preparation and utilities:

Rough grade building site and modify underground utilities.

Equipment – loader, backhoe, and truck.

Timeframe – Approximately 17 days.

(4.) Building foundation:

Dig/shore foundation, pour concrete, waterproofing, and remove shoring.

Equipment – backhoe, concrete pump/truck, hand/power tools, small drill rig, and crane.

Timeframe – Approximately 22 days.

(5.) Building shell:

Pre-cast concrete panel walls, panel walls, rough carpentry and roof framing, wall board, cable railing, metal flashing, and roofing.

Equipment – crane, truck, fork lift, hand/power tools.

Timeframe – Approximately 35 days.

(6.) Building exterior:

Doors and windows, siding paint, light fixtures, and plumbing fixtures.

Equipment – truck, hand/power tools, and chop saw.

Timeframe – Approximately 4 weeks.

(7.) Building interiors:

Walls, sewage lift station, rough and finish mechanical electrical plumbing structural (MEPS), wall board, door frames, doors and paint.

Equipment – truck, hand/power tools, and chop saw.

Timeframe – Approximately 37 days.

(8.) Site improvements:

Modify storm drain, concrete seat walls, curbs, and planters, fine grade, irrigation, hardscape, landscape, hand rails, plaques, and benches.

Equipment – backhoe, truck, hand/power tools, concrete pump/truck, and fork lift.

Timeframe – Approximately 37 days.

(9.) Final inspection, demobilization:

System testing, remove construction equipment, inspection, and corrections.

Equipment – truck, and hand/power tools.

Timeframe – Approximately 41 days.

The exact dates of the planned activities depend on logistics and scheduling.

Additional details regarding the demolition and construction activities of the Children's

Pool Lifeguard Station can be found in the City of San Diego's IHA application. The

IHA application can also be found online at:

<http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>

Dates, Duration, and Specific Geographic Region

The La Jolla Children's Pool Lifeguard Station is located at 827 ½ Coast

Boulevard, La Jolla, California 92037 (32° 50' 50.02" North, 117° 16' 42.8" West.

Because the City of San Diego is already requiring a moratorium on all construction

activities during harbor seal pupping and weaning (i.e., December 15<sup>th</sup> to May 30<sup>th</sup>; see page 5 of the Negative Declaration in the IHA application), work on this project can only be performed between June 1<sup>st</sup> and December 15<sup>th</sup> of any year. The City of San Diego is planning to begin the project at the Children's Pool in La Jolla, California on June 1, 2013, with site preparation (see page 30 to 31 of the Negative Declaration in the IHA application) followed by demolition of the existing station and construction of the new lifeguard station to be completed by December 15, 2013. The IHA may extend through June of 2014 to finish the demolition and construction activities if needed. The locations and distances (in ft) from the demolition/construction site to the Children's Pool haul-out area, breakwater ledge/rocks haul-out area, reef haul-out area, and Casa Beach haul-out area can be found in the City of San Diego's IHA application.

#### Comments and Responses

A notice of the proposed IHA for the City of San Diego's demolition and construction activities was published in the Federal Register on May 3, 2013 (78 FR 25958). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission), Western Alliance for Nature (WAN), San Diego Council of Divers (SDCOD), and numerous individuals. The comments are online at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. Following are their substantive comments and NMFS's responses:

Comment 1: The Commission recommends that NMFS issue the IHA, subject to inclusion of the proposed mitigation and monitoring measures.

Response: NMFS concurs with the Commission's recommendation and has issued the IHA to the City of San Diego. NMFS has modified several of the monitoring

and mitigation measures included in the proposed IHA for practicability reasons, as well as included several additional measures (see “Mitigation” and “Monitoring and Reporting” sections below for more information).

Comment 2: SDCOD and several individuals support the City of San Diego’s demolition and construction activities at the Children’s Pool Lifeguard Station and would like the action to begin immediately. The IHA application is well-researched and accurate, as it invokes every necessary caution and more, as Dr. Doyle Hanan has thoroughly documented the information in reports and has shown that the population of harbor seals is robust and resilient and not adversely impacted by human activity. The area is considered very valuable for recreational purposes to people who live near this location. The construction of the new lifeguard station is important for human safety.

Response: NMFS has factored the commenters’ recommendations and opinions into our final decision.

Comment 3: An individual state’s that they support the Children’s Pool as an important haul-out site and rookery for harbor seals and other marine mammals, and oppose the issuance of the IHA to the City of San Diego.

Response: Since February 2000, NMFS has managed the Children’s Pool as a haul-out and rookery for harbor seals and other pinnipeds. NMFS based this decision on the understanding that harbor seals first began to haul-out at the Children’s Pool in 1995, with ever increasing numbers and in 1999, for the first time, harbor seal pup births were documented at the Children’s Pool. As described in detail in the Federal Register notice for the proposed IHA (78 FR 25957, May 3, 2013), as well as in this document, NMFS does not believe that the City of San Diego’s demolition and construction activities

would cause injury, serious injury, or mortality to marine mammals, nor are those effects authorized under the IHA. The required monitoring and mitigation measures that the City of San Diego would implement during the demolition and construction activities would further reduce the adverse effects on marine mammals to the lowest levels practicable. NMFS anticipates only behavioral disturbance to occur during the conduct of the demolition and construction activities at the Children's Pool Lifeguard Station.

Comment 4: WAN and several individuals state that all demolition and construction work should be completed and cease after November 1<sup>st</sup> to avoid sensitive and critical life stages of harbor seals and not cause displacement from breeding areas. In the pregnancy cycle, the female is impregnated soon after weaning the pup. If the majority of births occur February, March, and April, weaning occurs from mid-March through mid-May. Implantation occurs as early as mid-April through mid-June. The earliest second trimester could occur as early as mid-July. The earliest third trimester could occur in November.

Pregnant females have been sighted on the beach beginning in late October to early November. Approximately 90% of adult females are in the advanced stages of pregnancy by early November. Hauling-out to rest is a daily requirement, and prolonged exposure to demolition and construction activities has the potential to displace marine mammals from breeding areas. The proposed IHA allows demolition and construction activities to continue until December 31<sup>st</sup>, which is two weeks after the start of the pupping season (at this latitude) and long after the harbor seals are in advanced stages of pregnancy. The project scheduling includes demolition and construction activities during use by pregnant females and goes into the start of the pupping season (officially starts

December 15<sup>th</sup>). Therefore, it does not avoid sensitive life stages. If the project is allowed to continue through the end of December, it could result in premature births and abortions, as well as site abandonment, when the pregnant females are subjected to constant high levels of stress. Any major disruption could be harmful to the pregnant females and their unborn pups (which could also affect the viability of the harbor seal colony at the Children's Pool) (Yochem and Stewart, 1998). An earlier end-date would minimize the risk to pregnant females, give them a chance to rest and prepare for birth, and reduce impacts to the rookery. It is pure speculation to state that the activities will not result in the alteration of reproductive behaviors or have any impact on site selection or birthing, particularly since the demolition and construction noise will continue into the late stages of pregnancy. The potential for threatening the viability of the pregnancy are definitely present during this period of demolition and construction. Therefore, the level of incidental harassment should be elevated to Level A harassment.

Response: NMFS included the date of December 31<sup>st</sup> in the proposed IHA, but we have since changed that date and required that the City of San Diego to cease planned demolition and construction activities for the Children's Pool Lifeguard Station by December 15, 2013. No demolition and construction activities will occur from December 15<sup>th</sup> to June 1<sup>st</sup>. This should provide more protection for the pregnant and nursing harbor seals in case they give birth before January 1<sup>st</sup>.

Harbor seals breed shortly after weaning their pups. Delayed implantation of the fertilized blastocyst occurs 1.5 to 3 months following breeding. The gestation period is approximately 9 months. The first full-term harbor seal pups are usually born at Children's Pool in January. Pups typically wean from their mothers in 4 to 7 weeks. The

last pups of the season may not wean until the end of May (Wilkin, 2004). NMFS has received documented reports of aborted harbor seal pups at Children's Pool. One potential cause of abortion or premature parturition is elevated maternal stress of pregnant harbor seal females, and this cannot be ruled out. However, other causes, such as infection disease or genetic conditions, cannot be ruled out either. Increased stress of pregnant harbor seals could potentially result in abortions or premature parturition (Wilkin, 2004). Dr. Hanan (2005) states that "it is normal for there to be some premature harbor seal pup births and pup abandonment. There are many possible reasons for these occurrences. For example, a female may reject a pup if something is biologically wrong with the pup." Based on his extensive experience, interactions with humans are not likely to be a significant cause of harbor seal pup abandonment.

In 2006, the pupping season was considered by the City of San Diego to be from January 1<sup>st</sup> to May 1<sup>st</sup>. In 2007, it was extended to December 15<sup>th</sup> to May 15<sup>th</sup> to provide more protection for the pregnant and nursing harbor seals. The docent program at the Children's Pool has observed and reported some premature births in mid-December; however, none of the four scientific papers written on the Children's Pool have observed births in December. In comparison to the City of San Diego's originally proposed demolition and construction schedule, the activities were changed to start in early to mid-June 2013, with all of the heavy demolition and construction activities to be completed by November 1, 2013. The revised timing avoids the heaviest portion of the demolition and construction during November and December. There are 8 days in November and 2 days in December scheduled for sound to exceed 100 dB at the source (not to exceed 90 dB at the haul-out area closest to the demolition and construction activities). These

activities are related to hardscape and landscaping activities, finish work, and demobilization of construction equipment. These activities should pose little, if any, potential impacts that would be considered Level B harassment to harbor seals at the Children's Pool.

The MMPA defines Level A harassment as “any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild.” As described in detail in the Federal Register notice for the proposed IHA (78 FR 25957, May 3, 2013), as well as in this document, NMFS does not believe that the City of San Diego's demolition and construction activities would cause injury, serious injury, or mortality to marine mammals, nor are those authorized under the IHA. The required monitoring and mitigation measures that the City of San Diego would implement during the demolition and construction activities would further reduce the adverse effects on marine mammals to the lowest levels practicable. NMFS anticipates only behavioral disturbance to occur during the conduct of the demolition and construction activities at the Children's Pool Lifeguard Station.

Comment 5: WAN and several individuals state that access to the Children's Pool beach must be closed to the public as direct harassment occurs on a regular basis. NMFS must require the City of San Diego to close Casa Beach during the demolition and construction of the lifeguard station and maintain the closure for 60 to 90 days after completion of the project, for public safety reasons for humans and to protect harbor seals from possible adverse impacts from the noise, equipment, and workers. The City of San Diego can close the beach as part of the Coastal Development Permit (CDP) for the demolition and construction without having to obtain California Coastal Commission



approval by barricading the stairs. The stairs are under the City of San Diego's jurisdiction and the CDP for the demolition and construction is under the City of San Diego and was never appealed to the California Coastal Commission. This is highly feasible and should be required.

Although the IHA requires monitoring and recording the impact of the demolition and construction activities on the harbor seals, that is not possible as long as humans are present at the beach, since there is no way to distinguish between the impacts of the demolition and construction activities and the impacts from human presence. Human presence, which continually causes large flushes and harassment of these harbor seals, will continue to be allowed and the monitoring does not even bother to record the presence of people on the beach. The contention that these harbor seals are habituated to the presence of humans and therefore will not be impacted by the sound of demolition and construction activities is not accurate. These harbor seals react to both human disturbance and sound, and in particular are not habituated at all to the demolition and construction noise. There is no attempt made to provide a mechanism to distinguish these two separate impacts. Monitoring without the presence of the public will allow for a more accurate determination as to what the short-term and long-term impacts of the demolition and construction activities may have on harbor seals in the action area.

Response: Closing the beach during the demolition and construction activities as well as for 60 to 90 days after the completion of the project would require a permit from the California Coastal Commission and is not feasible at this time. It is also not within NMFS's jurisdiction. There are signs posted at the Children's Pool warning that harassment of marine mammals is against the law, although no such signage is required

by law. NMFS has posted a sign at the Children's Pool that states "Warning! Marine mammals are protected by Federal laws. Please! Do NOT disturb marine mammals. Observe them from a safe distance and keep pets on a leash. Marine mammals are wild animals and can be dangerous! It is against the law to feed, harass, hunt, capture, or kill marine mammals. This includes any act of pursuit, torment, or annoyance that has the potential to injure or disturb a marine mammal. Violators are subject to civil and criminal penalties under the Marine Mammal Protection Act. Report violations to the NMFS Enforcement Hotline: 1-800-853-1964."

While the City of San Diego and NMFS agree that harbor seals often alert or flush for minor, as well as, significant stimulus including sound and visual cues, we believe that required NMFS-approved Protected Species Observers (PSOs) will be able to differentiate between demolition and construction-related disturbances versus those from the presence of the public that are unrelated to the demolition and construction disturbances. The benefit of monitoring by PSOs will be to distinguish, document and provide insight on impacts from the presence of humans and/or the demolition and construction activities. Dr. Hanan, the lead PSO, has substantial experience observing pinniped behavior (he first started observing harbor seals in this area in 1979 and has spent significant time observing seals along the U.S. west coast and offshore islands during the last 34 years) and the data collected will hopefully allow the City of San Diego to be able to identify these causes, especially for flushing and other behavioral responses in nearly all cases. When observing harbor seals, sometimes there are alerts and "flushings" for no apparent reason, which is all the more reason to have PSO's on-site documenting harbor seal behavior, human presence, and demolition and construction

activities for comparison to previous observations at this site and other sites with harbor seals that are away from the Children's Pool. NMFS and the City of San Diego do not see the need to close the stairs and beach to the public in order to improve monitoring.

Comment 6: WAN and several individuals recommend providing adequate sound mitigation to reduce the in-air sound levels and protect the harbor seals hearing from the in-air noise generated by the demolition and construction activities. There is no attempt to reduce the sound levels. This is critical since harbor seals orient by sound as well as visual cues, both on land and in the water. Above 90 dB, harbor seals hearing can be permanently impaired. The IHA takes the position that because many of the harbor seals in La Jolla are acclimated to humans watching them from distances of 15.2 m (50 ft) or sometimes less, that the harbor seal colony will therefore be unaffected by noise levels of 90 to 110 dB. There is no scientific basis to support this assertion.

The project intends to create a visible barrier with a plywood wall and then claims this will also serve as an acoustic barrier. This is not the case, as visual barriers are not necessarily acoustic barriers. Here only one layer of plywood is planned and that will have no impact on the sound levels, there is no evidence that a single layer of plywood has any acoustic deadening properties at all. The City of San Diego should erect a temporary sound barrier wall which would consist of a sound blanket or two layers of plywood with acoustic deadening material between them (which should be at least as wide as it is tall). Other methods to reduce noise include sound walls, mufflers, and sound blankets on all noise-generating equipment. None of these devices are being used, and such an acoustic wall is feasible and should be required. As such, the IHA fails to

use the best available technology to reduce the noise impacts on the harbor seals resulting in unnecessary Level B harassment.

Sound could also be mitigated further by moving heavy noise-generating machinery to the far south side of the site so that in-air sound levels are lower; transferring debris to the dump trucks at the street level rather than the trucks picking up the material at sand level; removing the old tower from the street piece-by-piece and not from the beach; as well as pre-fabricating the new lifeguard tower and other preparation of materials offsite to decrease on-site demolition and construction noise and shorten on-site construction time.

Response: In the City of San Diego's IHA application, they showed that the highest in-air sounds generated by the demolition and construction activities (approximately 110 dB) will dissipate to 90 dB or lower from the closest point of the building site to the harbor seal haul-out area, which is located approximately 10 m away. Therefore, additional sound barriers and mufflers are not necessary as the sound will not expose harbor seals to 90 dB or higher, which is lower than the NMFS's threshold for in-air sound for Level B harassment for harbor seals. NMFS has not established a threshold for in-air sound for Level A harassment (injury) for harbor seals and does not anticipate it to occur during the City of San Diego's demolition and construction activities.

The City of San Diego will require the contractor conducting the demolition and construction activities to keep the loudest sound as far away as possible from the Children's Pool beach. There will be no trucks on the beach, although there is a need for the bobcat loader to pick up material directly below the existing building. Every effort

will be made to keep sound levels as low as possible near the Children's Pool beach and on the top level above the beach.

Comment 7: An individual states that harbor seals use the Children's Pool beach differently at different times of the year. Detailed knowledge of the behavior of seals using this haul-out site and rookery would indicate that lifeguard tower demolition and construction activities should take place during daylight between the hours of 9 a.m. and 5 p.m. when most, if not all of the harbor seals, have departed the beach to avoid the hottest part of the day.

Response: NMFS disagrees with the individuals recommendations for the dates and times that the demolition and construction activities should take place. To the maximum extent practicable, the demolition and construction activities will be conducted from approximately 8:30 a.m. to 3:30 p.m. (i.e., daylight hours), during the daily period of lowest haul-out occurrence; however, demolition and construction activities may be extended 7 a.m. to 7 p.m. to help assure that the project is completed during the 2013 demolition and construction window. Harbor seals typically have the highest daily or hourly haul-out period during the afternoon from 3 p.m. to 6 p.m.

Comment 8: WAN and several individuals state that the proposed IHA improperly characterizes the La Jolla stock of Pacific harbor seals as habituated to human disturbance (e.g., human presence and associated loud noises) and can therefore tolerate additional disturbance. In their comments they present studies and video monitoring reports that support their assessments that the harbor seals have not been exposed to unfamiliar noise from demolition and construction equipment and will experience acoustic as well as visual disturbance from these activities. They further state that there

are very few scientific studies regarding the effects of in-air sound on these pinnipeds, and that most studies are on the effects of in-water sound (see WAN's full public comments online at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha>). They also expressed concern that the demolition and construction activities would lead to physiological responses to the additional stimuli (see Lindy Weilgart's response on habituation and tolerance in WAN's comments). The proposed activity could have the potential to displace the harbor seals from this breeding area and the applicant has not provided any credible scientific evidence to the contrary. Video evidence has shown that pregnant or sick harbor seals may not respond to direct harassment, but this does not mean that they are habituated to the extent claimed in the proposed IHA.

WAN has documented human-caused disturbance at the Children's Pool site using monitoring information from a continuously-operated surveillance camera. They have indicated that there is a significant difference between the numbers of harbor seals on the beach with and without human presence (see Table 1 of WAN's comments). In recent months during the later winter and spring period, they have documented numerous flushing incidents due to the presence of human, especially when they are on the ocean-side of the rope. WAN anticipates that the number of flushing incidents will rise during the summer as well as on weekends. Video of one of the human-caused disturbance events can be found online at:

<http://www.youtube.com/watch?v=UWH3z2iP1Ms&feature=youtu.be>. More

information on these incidents can be found in WAN's comments. Also, WAN states that the demolition and construction noise can be expected to dramatically increase the impacts of humans on the harbor seals and may be sufficient cause them to abandon the

site. They cite several incidents in March and April 2013 where harbor seals left the beach in response to levels of unrecorded noise that are presumed to be lower than those expected to be generated by the demolition and construction activities. Video of one of these disturbance events can be found online at:

<http://www.youtube.com/watch?v=VRQyn6IOUxY>.

In summary, these harbor seals are not habituated to the point that they would be expected to ignore additional human disturbance and there is no scientific analysis of the added impact to them of this additional human activity, particularly to an entirely new type of disturbance. The planned demolition and construction activities will exceed any past experience and may lead to adverse effects on this population.

Response: Generally, harbor seals are considered skittish and have the tendency to react or flush into the water at low levels of sound and/or movements. While a range of behavioral responses can be expected, it is difficult to predict what activities might cause noticeable behavioral reactions with Pacific harbor seals at this site. Children's Pool is a highly disturbed haul-out site and rookery, and the harbor seals observed at this location are unusually tolerant to the presence of humans, and do not respond in the same manner when exposed to stimuli (e.g., laughing, clapping, stomping, climbing, snorkeling, swimming, and wading) when compared to the behavior of other harbor seals in other areas (Hanan & Associates, 2004, 2011; Hanan, 2005).

Due to this uncertainty about how the harbor seals will behaviorally react to in-air sounds and visual cues from the demolition and construction activities, the City of San Diego has established a monitoring program to document responses and possible impacts. Dr. Hanan, the lead PSO, has been observing harbor seals at or near Children's Pool and

along the west coast of the U.S. since 1979. Based on his experience and expertise (court approved on harbor seals at Children's Pool; Valorie O'Sullivan vs. City of San Diego, 2005), he believes that when the harbor seals are in attendance at the Children's Pool, they display remarkable tolerance and are acclimated to human presence and anthropological sounds (Hanan, 2004; Hanan, 2011). Based on previous monitoring and observations, these "urbanized" animals still alert and flush, but much less than "non-urbanized" harbor seals at other sites and especially remote sites. Larger, older harbor seals seem less likely to alert and flush than younger harbor seals, which are more active when on land, moving into and out of the water continuously. Regarding the issue of potential abandonment, please see the response to comment 15 (below) in this document.

Comment 9: Several individuals state that the proposed IHA does not specify what timeframe the harbor seals are to be monitored prior to the beginning the demolition and construction activities to assess "normal reactions" often found at the beach. Such monitoring should begin weeks before the demolition and construction starts. In addition, the City of San Diego should obtain monitoring from WAN to determine a baseline for the presence of harbor seals and their distribution to analyze impacts from the demolition and construction activities.

Response: The City of San Diego began visual and acoustic monitoring for the demolition and construction activities in early June to establish baseline information on the presence and distribution of harbor seals and ambient sound levels at the site. To date, Dr. Hanan and other PSOs have been onsite monitoring on June 3, 5, 6, 12, and 13, 2012. Most days and nights they have also been monitoring the Children's Pool beach using the WAN webcam.



Comment 10: WAN and several individuals recommend requiring monitoring to continue for 60 to 90 days after the completion of demolition and construction activities to determine whether there is any long-term displacement from the breeding and resting area. There should be monitoring for at least 60 days after the demolition and construction activities cease to be certain that the same number of harbor seals frequent the beach, as did prior to the start of the demolition and construction activities. NMFS fails to require post-project monitoring for a reasonable period of time to determine if the proposed activities have caused displacement from the area and abandonment of the site as a rookery. The basis for this is that “no funds were included for this purpose.” The lack of funding does not justify omission of a determination as to what the impacts of the project are. The only way to determine if abandonment has occurred or if there has been any long-term impact (e.g., a reduction in numbers) is to require a 60-day post-project monitoring period and then a requirement to put in place a recovery plan, to help re-establish the colony should it turn out that the projected lack of impact proves false.

Response: The City of San Diego has modified the monitoring program and it will extend for 60 days following the end of the demolition and construction activities. The City of San Diego will have a program where PSOs that will randomly select a day per week to visit the Children’s Pool. The monitoring data collected at the Children’s Pool site will be integrated with 10 randomly selected 30 minute monitoring periods using the WAN webcam on three non-observed days via their computers. NMFS has included this as a requirement in the IHA. A re-establishment or recovery plan has not been developed because the City of San Diego and NMFS thinks that abandonment by the harbor seals at the Children’s Pool site is highly unlikely.

Comment 11: WAN and several individuals state that the monitoring plan should include observations of the numbers of people on the beach, their location relative to the harbor seals, and any impacts of their presence at the time of counting the harbor seals on the beach. The presence of the public is a major factor affecting the behavior of the harbor seals and a determination should be made as to whether or not the harassment is attributable to the presence of the public or to the demolition and construction activities. Recording this data is necessary in order to understand the influence of people on harassment. The noise caused by the presence of humans or the noise caused by demolition and construction activities may be additive, synergistic, or multiplicative, magnifying the effects of the human disturbance.

Response: NMFS has included a requirement to this effect in the IHA issued to the City of San Diego.

Comment 12: WAN states that the monitoring proposed is to start 30 minutes prior to demolition and construction activities and at least 30 minutes after cessation of the in-air noise-generating activity. The monitoring should be conducted at all times (24 hours/7 days per week) or at least one hour prior to sunrise and one hour after sunset, in order to know what impact the demolition and construction may or may not have on the harbor seals since humans are also present then. The WAM webcam can monitor the Children's Pool beach 24 hours/7 days per week and can monitor the number of pinnipeds accessing the beach before, during, and after the demolition and construction activities. WAN is willing to work with the City of San Diego to employ the technical advantage of the surveillance camera during the project. WAN has obtained data on harassment, haul-out patterns, presence of humans on the beach (both behind and in front

of the rope), weather, etc. WAN states that there is considerable baseline data available that is not being used. The number of harbor seals can vary widely depending on a number of factors, weather, tides, and presence of humans. Three to five days is an insufficient amount of time to get any statistically meaningful baseline data. Since February 2013, monitoring reports have been recorded every hour during the day from 6 a.m. to 2 a.m. the next morning. This baseline data is backed-up by video recording of the entire day (24 hours/7days per week). This extensive data should be reviewed and analyzed for use in determining an accurate baseline, particularly as it relates to haul-out patterns. To understand a complex situation it is necessary to reduce as many variables as possible.

Response: NMFS regulations suggest means of learning of, encouraging, and coordinating research opportunities, plans, and activities relating to reducing such incidental taking and evaluating its effects. NMFS has encouraged the City of San Diego to work with WAN to review and analyze any available data to determine baseline information as well as evaluate the impacts from the demolition and construction activities on the pinnipeds at the Children's Pool. The City of San Diego informed NMFS it is open to working with the WAN's La Jolla Harbor Seal Webcam, which can be found online at: [http://www.wanconservancy.org/la\\_jolla\\_harbor\\_seal\\_earthcam.htm](http://www.wanconservancy.org/la_jolla_harbor_seal_earthcam.htm). The City of San Diego may do periodic checks using the webcam for monitoring purposes. The camera is not expected to replace NMFS-qualified PSOs at the site making accurate counts, measuring sound levels and observing the public and the construction, as well as the seals. In the camera view, you may be able to see visual evidence of Level B harassment, but it probably would not be able to be distinguished between harassment

from demolition and construction activities and the public since the camera has a limited scope and only shows the Children's Pool beach and pinnipeds (usually a specific portion of the beach, but not the reef nor nearby beaches).

Comment 13: WAN asks why have no studies been done to determine the extent of the current background noise? Even if such studies show background noise is elevated, the sound levels come in major part from the ocean itself and from traffic noise above. The demolition and construction noise will be in addition to the existing sound sources, will be additive, and will be totally different in sound level and frequency.

Response: The City of San Diego will conduct acoustic monitoring by PSOs using hand-held digital sound level meters. The acoustic monitoring will be conducted at the beach of the haul-out site as well as at surrounding areas of the Children's Pool. The acoustic monitoring will be conducted before, during, and after demolition and construction activities to gather baseline data on background (i.e., ambient) sound levels as well as validate predicted sound levels from the equipment being used.

Comment 14: An individual states that it is very important that these PSOs must be honest and objective, and not volunteers from any animal extremist group. Dr. Hanan, as the lead PSO, is obligated to report on all observable reactions. Currently there are independent monitors from the animal activist groups at the Children's Pool. They may have had good attentions, but members of these organizations are biased and not objective, and any comments and information must be carefully reviewed for accuracy as to not wrongly influence decision makers.

The SDCOD have objection to some of the oversight of monitoring data gathered on the effects of the activities on harbor seals. The SDCOD requests the Commission

take direct oversight and ensure that the research is solely in control of Dr. Hanan without conditions or personnel imposed as well as to provide oversight to prevent the degradation of science and law, to provide impartial oversight and a more neutral body. The personnel choices and monitoring data should not be under the control of an agency directly involved in secondary purposes as there is motive to skew data. The Commission needs to ensure any IHA is administered so the MMPA works per intent with undistorted science behind it. This needs to be a condition of the IHA being issued by NMFS.

Response: Dr. Hanan, an independent biologist, will be the lead PSO for the mitigation and monitoring program required by the IHA. NMFS-qualified PSO resume and curriculum vitae's are reviewed and approved by NMFS on a project-by-project basis. NMFS is the Federal agency charged with issuing the IHA under the MMPA to the City of San Diego and requiring the mitigation, monitoring, and reporting measures. The Commission is an independent agency of the U.S. government, established under Title II of the MMPA to provide independent oversight of the marine mammal conservation policies and programs being carried out by Federal regulatory agencies. A description of the seven duties the Commission is charged with as well as other responsibilities can be found online at:

<http://www.mmc.gov/about/welcome.shtml#missions>. NMFS forwarded copies of the IHA application and notice of proposed IHA (78 FR 25958, May 3, 2013) to the Commission and its Committee of Scientific Advisors, and the Commission provided a letter to NMFS on May 21, 2013. The Commission recommends that NMFS issue the

IHA, subject to inclusion of the proposed mitigation and monitoring measures (see above in this document).

Comment 15: WAN and several individuals state that using 12,783 takes over the entire project period equates to 1,826 takes per month. If after at least a month of monitoring the average actual take exceeds the predicted number of authorized takes by 25% or results in adverse impacts to the colony, the demolition and construction activities should be shut-down and the City of San Diego required to work with NMFS to develop and implement a revised mitigation plan to reduce the further reduce the number of takes and impacts to the expected level.

The harbor seals do not have any safe places to go if the demolition and construction activities cause their abandonment. Given anthropogenic impacts to the ocean or other unexpected catastrophic events, this fragment of a colony might well be a saving remnant if something were to happen to the waters off the other large harbor seal colonies of the Channel Islands, Point Mugu or Carpenteria. If it is determined that harbor seals have not returned to the Children's Pool beach in their pre-project numbers or have abandoned the site, the City of San Diego should work with NMFS to develop a program designed to re-establish the colony at the site.

Response: Harbor seals observed at the Children's Pool site already use nearby haul-out sites at Point Loma and Torrey Pines State Beach (at night) in low numbers. Point Mugu, Carpenteria, Goleta, and Point Conception are mainland haul-out sites that are used by large numbers of harbor seals in the region. These harbor seals may also travel to offshore areas such as the Channel Islands (Steward and Yochem, 1994; Hanan, 1996; Hanan & Associates, 2011).

The City of San Diego will be monitoring the harbor seals reactions to noise levels, demolition and construction practices, machinery placement, and workers in the study. See the “Monitoring and Reporting” section of this document for more information on the City of San Diego’s monitoring plan. If monthly monitoring results in observations of impacts greater than anticipated, NMFS will work with the City of San Diego to develop and implement additional monitoring and mitigation measures to further reduce potential impacts from the demolition and construction activities. If the City of San Diego exceeds their authorized take in the IHA for demolition and construction activities at the Children’s Pool Lifeguard Station, they will re-initiate consultation under the MMPA with NMFS.

After the first two months of monitoring during demolition and construction activities, the City of San Diego will take the mean number of observed harbor seals at the Children’s Pool in a 24-hour period across that two months and compare it to the mean of the lower 95 percent confidence interval in Figure 1 (see below). If the observed mean is lower, the City of San Diego will shut-down demolition and construction activities and work with NMFS and other harbor seal experts (e.g., Mark Lowry, Dr. Sarah Allen, Dr. Pamela Yochem, and/or Dr. Brent Stewart) to develop and implement a revised mitigation plan to further reduce the number of takes and potential impacts. Once a week every week thereafter, the City of San Diego will take the same mean of observed harbor seals across the previous three tide cycles (a tide cycle is approximately 2 weeks) and compare it to the 95% lower confidence interval in Figure 1 for the same time period. If the observed mean is lower, the City of San Diego will shut-down and take the action described above. If abandonment of the site is likely, monitoring will be expanded away

from the Children's Pool to determine if animals have been temporarily displaced to haul-out sites in the southern California area (e.g., Torrey Pines, Point Loma, etc.). A re-establishment or recovery plan has not been developed because the City of San Diego and NMFS think that abandonment by the harbor seals at the Children's Pool site is highly unlikely.

Comment 16: WAN states that the duration of the demolition and construction activities are not short; it is planned for five days per week, each and every week for seven months. There should be a follow-up study and report submitted at least 60 days after cessation of all activities to determine whether or not any long-term or permanent impacts have occurred.

Response: All monitoring data collected before, during, and after demolition and construction activities will be included in the biological monitoring notes to be submitted. The City of San Diego would notify NMFS Headquarters and the NMFS Southwest Regional Office prior to initiation of the demolition and construction activities. A draft final report must be submitted to NMFS within 90 days after the conclusion of the demolition and construction activities of the Children's Pool Lifeguard Station. The report would include a summary of the information gathered pursuant to the monitoring requirements set forth in the IHA, including dates and times of operations, and all marine mammal sightings (dates, times, locations, species, behavioral observations [activity, group cohesiveness, direction and speed of travel, etc.], tidal stage, weather conditions, Beaufort sea state and wind force, activities, associated demolition and construction activities). A final report must be submitted to the Regional Administrator within 30



days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report would be considered to be the final report.

Comment 17: WAN states that if there were serious injury or injury, an immediate report should also be made to Sea World's stranding program so that Sea World might make an attempt at rescuing the injured animal for possible rehabilitation.

Response: Contacting Sea World's stranded animal hotline (1-800-541-7325) is the standard operating procedure for live stranded animals (sick and injured) at Children's Pool. Sea World should also be notified for dead stranded pinnipeds so that a necropsy can be performed. NMFS should be notified as well, but for immediate response purposes Sea World should be contacted first. Dead stranded cetaceans should be reported to NMFS Southwest Fisheries Science Center at 858-546-7162. NMFS has included this as a reporting requirement in the IHA

Comment 18: An individual states that given these are wild animals, putting out maximum effort to find their own food supply and maintain their own health, the duration of the project is very likely to outstrip the animal's reserves – stress, lack of adequate haul-out time to rest, re-oxygenate, keep up their internal warmth and build up their strength, necessary every day. The colony only consists of around 250 harbor seals, the expected number of "takings" could very well cause desertion of the site and a high rate of mortality. Thus, recommend a change to the IHA to include Level A harassment, as it is a more realistic type of "take."

Response: The MMPA defines Level A harassment as "any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild." As described in detail in the Federal Register notice for the

proposed IHA (78 FR 25957, May 3, 2013), as well as in this document, NMFS does not believe that the City of San Diego's demolition and construction activities would cause injury, serious injury, or mortality to marine mammals, nor are those authorized under the IHA. The required monitoring and mitigation measures that the City of San Diego would implement during the demolition and construction activities would further reduce the adverse effects on marine mammals to the lowest levels practicable. NMFS anticipates only behavioral disturbance to occur during the conduct of the demolition and construction activities at the Children's Pool Lifeguard Station.

Comment 19: WAN and an individual state that NMFS fails to analyze that there may be possible long-term impacts on the harbor seal population from increased visitors and noise at the new facilities. The new facilities could increase the number of visitors to the beach. In particular, the new facilities will have bathrooms at the beach level (current facilities are at the street level). Since the bathrooms in the new lifeguard tower are at beach level, which is closer to the harbor seals, it would be important to study the long-term impacts on the harbor seals from the increased number of visitors and bathroom use. The IHA should include a study to assess the impact of noise from increased visitors and bathroom. The IHA should not be approved, as it stands, unless these problems are dealt with, as it would not satisfy either Federal requirements under the MMPA or the San Diego City Municipal Code.

Response: NMFS does not believe that the future use of the bathroom on the beach level when the new facilities are completed to be in the scope of this project and IHA request. The City of San Diego has not requested take, by Level B harassment,

incidental to the use of the bathroom by visitors at the new lifeguard station, which has yet to be completed, and none has been authorized.

Comment 20: WAN states that NMFS fails to properly characterize this colony of harbor seals as a “population stock,” as this population of animals is spatially isolated, hauls-out, breeds, and mates among its members in this area. NMFS references outdated stock assessment reports that were done before the colony at La Jolla was well established and no genetic studies have been conducted. This distinct group of seals should be characterized as a “population stock” that meets the definition in the MMPA as it is a distinct group with distinct behavioral patterns in this particular location at the Children’s Pool.

Response: The MMPA defines the term “population stock” or “stock” as a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature. In NMFS’s U.S. Pacific marine mammal stock assessments, NMFS considers the Pacific harbor seals that occur at the Children’s Pool to be part of the California stock (NMFS, 2011). Although NMFS knows that geographic structure exists along an almost continuous distribution of harbor seals from California to Alaska, stock boundaries are difficult to draw because any rigid line is (to a greater or lesser extent) arbitrary from a biological perspective. An unknown number of harbor seals also occur along the west coast of Baja California, at least as far south as Isla Asuncion, which is about 161 km (100 miles) south of Punta Eugenia. Animals along Baja California are not considered to be part of the California stock because it is not known if there is any demographically significant movement of harbor seals between California and Mexico and there is no international agreement for joint management of

harbor seals (NMFS, 2011). Determination of population structure of harbor seals using the area will require further research using a combination of scientific techniques that includes morphological and genetic analysis (Hanan & Associates, 2011).

Comment 21: WAN and other individuals state that the take estimates in the City of San Diego's IHA application do not meet the "small numbers" requirement of the MMPA. NMFS has blatantly disregarded the MMPA's prohibition on allowing the take of more than small numbers of marine mammals. Most egregiously, NMFS estimates that 12,783 takes will occur affecting 100% of the La Jolla population stock. NMFS does not attempt to explain how its take estimates meet the "small numbers" requirement. The IHA entirely disregards this statutory requirement. NMFS does not attempt to define small numbers, nor does it undertake any sort of analysis of what small numbers might be, thus violating the MMPA. The number of takes should be reduced to a smaller percentage to the population stock as to meet the small numbers requirement of the MMPA.

Response: NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of the City of San Diego conducting demolition and construction activities at the Children's Pool Lifeguard Station, June to December 2013, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of 3 species of marine mammals (see Table 2 below for authorized take numbers and approximate percentage of best population estimate of stock). NMFS has determined that the 12,783 authorized takes (i.e., number of exposures) of approximately up to 600 Pacific harbor seals is a small number, as it is approximately 1.98% of the estimated best

population (30,196 animals) in the California stock. The authorized takes of California sea lions and northern elephant seals is less than 0.01 percent of the respective U.S. and California breeding stocks.

Comment 22: WAN and an individual state that the IHA cannot legally be issued under the MMPA, as it does not rely on the best available scientific data regarding the impacts from the noise-generated by demolition and construction activities on marine mammals and have greater than a negligible impact on the stock of Pacific harbor seals, especially since the incidence of “take” on this population is 100%. Throughout the document the IHA fails to provide reference to valid, up-to-date studies to justify many of the conclusions. Studies were either not cited because there are none, or were cited that had no relevance or were so out-dated that they also had no relevance. For the most part, conclusions reached were based on conjecture and not on evidence. For the IHA to meet the requirements of the MMPA, it must be accompanied by accurate and appropriate scientific studies; however, it fails to meet that test.

Response: NMFS and the City of San Diego have used the best available data and science regarding the biology of pinnipeds affected and the propagation of in-air sounds from the equipment used during demolition and construction activities in making the decision on whether or not to issue the IHA to the City of San Diego for the demolition and construction activities at the Children’s Pool Lifeguard Station. Regarding exposure of marine mammals to high-level in-air sounds, NMFS has established at or above 90 dB re 20  $\mu$ Pa for harbor seals and at or above 100 dB re 20  $\mu$ Pa for all other pinniped species (i.e., seals and sea lions) as a criterion for potential Level B harassment (Lawson et al., 2002; Southall et al., 2007). NMFS has not

established criterion for potential Level A harassment. The required determinations, mitigation and monitoring measures in the IHA are supported by the best available scientific information, which has been available for public review. The IHA has been designed to ensure that the impacts on the affected species or stocks of marine mammals will be negligible and the takings will be at the lower level practicable.

Generally, under the MMPA, NMFS shall authorize the harassment of small numbers of marine mammals incidental to an otherwise lawful activity, provided NMFS finds that the taking will have a negligible impact on the species or stock, will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth to achieve the least practicable adverse impact. NMFS has defined “negligible impact” in 50 CFR 216.103 as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” NMFS believes that the time period of the demolition and construction activities, the small footprint of in-air sound, the requirement to implement mitigation measures, and the inclusion of the monitoring and reporting measures, will reduce the amount and severity of the potential impacts from the activity to the degree that it will have a negligible impact on the species or stocks in the action area. The City of San Diego has applied for an IHA and has met the necessary requirements for issuance of an IHA for small numbers of marine mammals, by Level B harassment, incidental to the demolition and construction activities

at the Children's Pool Lifeguard Station in La Jolla, California. Therefore, NMFS has issued an IHA to the City of San Diego.

#### Description of Marine Mammals in the Specified Geographic Area of the Specified Activity

Three species of pinnipeds are known to or could occur in the Children's Pool action area and off the Pacific coastline (see Table 1 below). Pacific harbor seals, California sea lions, and northern elephant seals are the three species of marine mammals that occur and are likely to be found within the activity area; thus, they are likely to be exposed to effects of the specified activities. NMFS and the City of San Diego do not expect incidental take of other marine mammal species. A variety of other marine mammals have on occasion been reported from the coastal waters of southern California. These include gray whales, killer whales, bottlenose dolphins, Steller sea lions, northern fur seals, and Guadalupe fur seals. However, none of these species have been reported to occur in the action area. Table 1 below outlines the cetacean and pinnipeds species, their habitat, and conservation status in the nearshore area of the general region of the project area.

Table 1. The habitat, abundance, and conservation status of marine mammals inhabiting the general region of the action area in the Pacific Ocean off the southern coast of California.

Species	Habitat	Best Population Estimate (Minimum) <sup>1</sup>	ESA <sup>2</sup>	MMPA <sup>3</sup>	Population Trend
<b>Mysticetes</b>					
Gray whale ( <u>Eschrichtius robustus</u> )	Coastal and shelf	19,126 (18,107)	DL – Eastern Pacific stock EN – Western Pacific stock	NC – Eastern Pacific stock D – Western Pacific stock	Increasing over past several decades
<b>Odontocetes</b>					
Killer whale ( <u>Orcinus orca</u> )	Widely distributed	354 (354) - West Coast Transient stock	NL EN – Southern resident population	NC D – Southern Resident and AT1 Transient populations	Increasing – West Coast Transient stock
Bottlenose dolphin ( <u>Tursiops truncatus</u> )	Offshore, inshore, coastal, estuaries	323 (290) – California Coastal stock	NL	NC	Stable
Long-beaked common dolphin ( <u>Delphinus capensis</u> )	Inshore	107,016 (76,224) – California stock	NL	NC	Increasing
<b>Pinnipeds</b>					
Pacific harbor seal ( <u>Phoca vitulina richardii</u> )	Coastal	30,196 (26,667) – California stock	NL	NC	Increased in California 1981 to 2004
Northern elephant seal ( <u>Mirounga angustirostris</u> )	Coastal, pelagic when not migrating	124,000 (74,913) – California breeding stock	NL	NC	Increasing through 2005, now stable
California sea lion ( <u>Zalophus californianus</u> )	Coastal, shelf	296,750 (153,337) – U.S. stock	NL	NC	Increasing
Steller sea lion ( <u>Eumetopias jubatus</u> )	Coastal, shelf	72,223 (58,334) – Eastern U.S. stock	T – Eastern U.S. stock EN – Western U.S. stock	D	Overall increasing, decreasing in California
Northern fur seal ( <u>Callorhinus ursinus</u> )	Pelagic, offshore	9,968 (5,395) – San Miguel Island stock	NL	NC – San Miguel Island stock	Increasing
Guadalupe fur seal ( <u>Arctocephalus townsendi</u> )	Coastal, shelf	7,408 (3,028) – Mexico to California	T	D	Increasing



NA = Not available or not assessed.

<sup>1</sup> NMFS Marine Mammal Stock Assessment Reports

<sup>2</sup> U.S. Endangered Species Act: EN = Endangered, T = Threatened, DL = Delisted, and NL = Not listed.

<sup>3</sup> U.S. Marine Mammal Protection Act: D = Depleted, S = Strategic, and NC = Not classified.

The rocks and beaches at or near the Children's Pool in La Jolla, California, are almost exclusively Pacific harbor seal hauling-out sites. On infrequent occasions, one or two California sea lions or a single juvenile northern elephant seal, have been observed on the sand or rocks at or near the Children's Pool (i.e., breakwater ledge/rocks haul-out area, reef haul-out area, and Casa Beach haul-out area). These sites are not usual haul-out locations for California sea lions and/or northern elephant seals. The City of San Diego commissioned two studies of harbor seal abundance trends at the Children's Pool. Both studies reported that appearances of California sea lions and northern elephant seals are infrequent, but not rare at Children's Pool (Yochem and Stewart, 1998; Hanan & Associates, 2004).

#### Pacific Harbor Seal

Harbor seals are widely distributed in the North Atlantic and North Pacific. Two subspecies exist in the Pacific Ocean: P. v. stejnegeri in the western North Pacific near Japan, and P. v. richardii in the eastern North Pacific. The subspecies in the eastern North Pacific Ocean inhabits near-shore coastal and estuarine areas from Baja California, Mexico, to the Pribilof Islands in Alaska. These seals do not make extensive pelagic migrations, but do travel 300 to 500 kilometers (km) (162 to 270 nautical miles [nmi]) on occasion to find food or suitable breeding areas (Herder, 1986; Harvey and Goley, 2011). Previous assessments of the status of harbor seals have recognized three stocks along the west coast of the continental U.S.: (1) California, (2) Oregon and Washington outer coast waters, and (3) inland waters of Washington. An unknown number of harbor seals also occur along the west coast of Baja California, at least as far south as Isla Asuncion, which is about 100 miles south of Punta Eugenia. Animals along Baja California are not

considered to be a part of the California stock because it is not known if there is any demographically significant movement of harbor seals between California and Mexico and there is no international agreement for joint management of harbor seals. In California, approximately 400 to 600 harbor seal haul-out sites are distributed along the mainland coast and on offshore islands, including intertidal sandbars and ledges, rocky shores and islets, and beaches (Harvey *et al.*, 1995; Hanan, 1996; Lowry *et al.*, 2008). Of these haul-out sites, only 14 locations are rookeries (2 locations have multiple sites, for a total of 17 sites) on or near the mainland of California. Preferred haul-out sites are those that are protected from the wind and waves, and allow access to deep water for foraging (Perrin *et al.*, 2008). Harbor seals are one of the most common and frequently observed marine mammals along the coastal environment.

The population of harbor seals has grown off the U.S. west coast and has led to new haul-out sites being used in California (Hanan, 1996). Pacific harbor seals haul-out year-round on nearby beaches and rocks (i.e., breakwater ledge/rocks haul-out area, reef haul-out area, and Casa Beach haul-out area) below the lifeguard tower at Children's Pool. According to Yochem (2005), the Children's Pool beach site is used by harbor seals at all hours of the day and at all tides with the exception of occasional high tide/high swell events in which the entire beach is awash. Harbor seals have been observed hauling-out and documented giving birth at the Children's Pool since the 1990's (Yochem and Stewart, 1998; Hanan & Associates, 2004). It is the only rookery in San Diego County and the only mainland rookery on the U.S. west coast between the border of Mexico and Point Mugu in Ventura County, California (321.9 km [200 miles]). Also, it is one of the three known haul-out sites for this species in San Diego County. They

haul-out, give birth to pups, nurse, and molt their pelage on the beach and often forage for food in nearby areas. Harbor seal numbers have increased since 1979 and seals are documented to give birth on these beaches during December through May (Hanan, 2004; 2011). The official start to pupping season is December 15<sup>th</sup>. Females in an advanced stage of pregnancy begin to show up on the Children's Pool beach by late October to early November. Several studies have identified harbor seal behavior and estimated harbor seal numbers including patterns of daily and seasonal area use (Yochem and Stewart, 1998; Hanan & Associates, 2004, 2011; Linder, 2011). Males, females, and pups (in season) of all ages and stages of development are observed at the Children's Pool and adjacent areas.

In southern California, a considerable amount of information is known about the movements and ecology of harbor seals, but population structure in the region is not as well known (Stewart and Yochem, 1994, 2000; Keper et al., 2005; Hanan & Associates, 2011). Linder (2011) suggests that this population moves along the California coast and the beach at Children's Pool is part of a "regional network of interconnected" haul-out and pupping sites. Harbor seals often haul-out in protected bays, inlets, and beaches (Reeves et al., 1992). At and near the Children's Pool, harbor seals haul-out on the sand, rocks, and breakwater base in numbers of 0 to 15 harbor seals to a maximum of about 150 to 200 harbor seals depending on the time of day, season, and weather conditions (Hanan & Associates, 2004, 2011; Linder, 2011). Based on monitoring from a camera, WAN reports that during the month of May 2013, at any given time, up to 302 harbor seals were documented resting on the Children's Pool beach with additional harbor seals on the rocks and in the water (Wan, personal communication). Almost every day, except

for weekends, the number of harbor seals on the beach was over 250 individuals. During the months of September 2012 to January 2013, the average number of harbor seals on the beach during hours prior to people on the beach or with people behind the rope varied from 83 to 120 animals. During this same period when there were people on the beach with or without the rope, but where people were across the rope, the average varied between 7 to 27, which is significantly less. The weather (i.e., wind and/or rain) as well as the proximity of humans to the beach likely affect the presence of harbor seals on the beach. These animals have been observed in this area moving to/from the Children's Pool, exchanging with the rocky reef directly west of and adjacent to the breakwater and with Seal Rock, which is about 150 m (492 ft) west of the Children's Pool. Harbor seals have also been reported on the sandy beach just southwest of the Children's Pool. At low tide, additional space for hauling-out is available on the rocky reef areas outside the retaining wall and on beaches immediately southward. Haul-out times vary by time of year, from less than an hour to many hours. There have been no foraging studies at this site, but harbor seals have been observed in nearshore waters and kelp beds nearby, including La Jolla Cove.

Radio-tagging and photographic studies have revealed that only a portion of seals utilizing a hauling-out site are present at any specific moment or day (Hanan, 1996, 2005; Gilbert et al., 2005; Harvey and Goley, 2011; and Linder, 2011). These radio-tagging studies indicate that harbor seals in Santa Barbara County haul-out about 70 to 90% of the days annually (Hanan, 1996), the City of San Diego expects harbor seals to behave similarly at the Children's Pool. Tagged and branded harbor seals from other haul-out sites have been observed by Dr. Hanan at the Children's Pool. Harbor seals have been

observed with red-stained heads and coats, which are typical of some harbor seals in San Francisco Bay, indicating that seals tagged at other locations and haul-out sites do visit the Children's Pool. A few seals have been tagged at the Children's Pool and there are no reports of these tagged animals at other sites (probably because of very low re-sighting efforts and a small sample size [10 individuals radio-tagged]), which may indicate a degree of site-fidelity (Yochem and Stewart, 1998). These studies further indicate that seals are constantly moving along the coast including to/from the offshore islands and that there may be as many as 600 individual harbor seals using Children's Pool during a year, but certainly not all at one time.

The City of San Diego has fitted a polynomial curve to the number of expected harbor seals hauling-out at the Children's Pool by month (see Figure 1 of the IHA application and Figure 2 below) based on counts at the Children's Pool by Hanan & Associates (2004, 2011), Yochem and Stewart (1998), and the Children's Pool docents (Hanan & Associates, 2004). A three percent annual growth rate of the population was applied to Yochem and Stewart (1998) counts to normalize them to Hanan & Associates and docent counts in 2003 to 2004.

A complete count of all harbor seals in California is impossible because some are always away from the haul-out sites. A complete pup count (as is done for other pinnipeds in California) is also not possible because harbor seals are precocial, with pups entering the water almost immediately after birth. Population size is estimated by counting the number of seals ashore during the peak haul-out period (May to July) and by multiplying this count by a correction factor equal to the inverse of the estimated fraction of seals on land. Based on the most recent harbor seal counts (2009) and including a

revised correction factor, the estimated population of harbor seals in California is 30,196 individuals (NMFS, 2011), with an estimated minimum population of 26,667 for the California stock of harbor seals. Counts of harbor seals in California increased from 1981 to 2004. The harbor seal is not listed under the ESA and the California stock is not considered depleted or strategic under the MMPA (Carretta et al., 2010).

### California Sea Lion

The California sea lion is now considered to be a full species, separated from the Galapagos sea lion (Zalophus wollebaeki) and the extinct Japanese sea lion (Zalophus japonicus) (Brunner, 2003; Wolf et al., 2007; Schramm et al., 2009). The breeding areas of the California sea lion are on islands located in southern California, western Baja California, and the Gulf of California. Genetic analysis of California sea lions identified five genetically distinct geographic populations: (1) Pacific Temperate, (2) Pacific Subtropical, (3) Southern Gulf of California, (4) Central Gulf of California, and (5) Northern Gulf of California (Schramm et al., 2009). In that study, the Pacific Temperate population included rookeries within U.S. waters and the Coronados Islands just south of U.S./Mexico border. Animals from the Pacific Temperate population range north into Canadian waters, and movement of animals between U.S. waters and Baja California waters has been documented, though the distance between the major U.S. and Baja California rookeries is at least 740.8 km (400 nmi). Males from western Baja California rookeries may spend most of the year in the U.S.

The entire population cannot be counted because all age and sex classes are never ashore at the same time. In lieu of counting all sea lions, pups are counted during the breeding season (because this is the only age class that is ashore in its entirety), and the

numbers of births is estimated from the pup count. The size of the population is then estimated from the number of births and the proportion of pups in the population. Censuses are conducted in July after all pups have been born. There are no rookeries at or near the Children's Pool. Population estimates for the U.S. stock of California sea lions, range from a minimum of 153,337 to an average estimate of 296,750 animals. They are considered to be at carrying capacity of the environment. The California sea lion is not listed under the ESA and the U.S. stock is not considered depleted or strategic under the MMPA.

#### Northern Elephant Seal

Northern elephant seals breed and give birth in California (U.S.) and Baja California (Mexico), primarily on offshore islands (Stewart *et al.*, 1994), from December to March (Stewart and Huber, 1993). Males feed near the eastern Aleutian Islands and in the Gulf of Alaska, and females feed further south, south of 45° North (Stewart and Huber, 1993; Le Boeuf *et al.*, 1993). Adults return to land between March and August to molt, with males returning later than females. Adults return to their feeding areas again between their spring/summer molting and their winter breeding seasons.

Populations of northern elephant seals in the U.S. and Mexico were all originally derived from a few tens or a few hundreds of individuals surviving in Mexico after being nearly hunted to extinction (Stewart *et al.*, 1994). Given the very recent derivation of most rookeries, no genetic differentiation would be expected. Although movement and genetic exchange continues between rookeries when they start breeding (Huber *et al.*, 1991). The California breeding population is now demographically isolated from the



Baja California population. The California breeding population is considered in NMFS stock assessment report to be a separate stock.

A complete population count of elephant seals is not possible because all age classes are not ashore at the same time. Elephant seal population size is typically estimated by counting the number of pups produced and multiplying by the inverse of the expected ratio of pups to total animals (McCann, 1985). Based on the estimated 35,549 pups born in California in 2005 and an appropriate multiplier for a rapidly growing population, the California stock was approximately 124,000 in 2005. The minimum population size for northern elephant seals can be estimated very conservatively as 74,913, which is equal to twice the observed pup count (to account for the pups and their mothers), plus 3,815 males and juveniles counted at the Channel Islands and central California sites in 2005 (Lowry, NMFS unpublished data). Based on trends in pup counts, northern elephant seal colonies were continuing to grow in California through 2005, but appear to be stable or slowly decreasing in Mexico (Stewart *et al.*, 1994). Northern elephant seals are not listed under the ESA and are not considered as depleted or a strategic stock under the MMPA.

Further information on the biology and local distribution of these marine mammal species and others in the region can be found in the City of San Diego's application, which is available upon request (see ADDRESSES), and the NMFS Marine Mammal Stock Assessment Reports, which are available online at:

<http://www.nmfs.noaa.gov/pr/sars/>.

Potential Effects on Marine Mammals

Richardson et al. (1995) has documented changes in behavior and auditory threshold shifts in response to in-air and underwater noise. Behavioral responses to loud noises could include startle, alertness, changes in physical movement, temporary flushing from the beach, site abandonment, and pup abandonment (Allen, 1991; Kastak and Schusterman, 1996; Kastak et al., 1999; Hanan & Associates, 2011). NMFS and the City of San Diego anticipate short-term behavioral impacts on pinnipeds at the Children's Pool to include startle, alertness, changes in physical movement, temporary flushing from the beach, and general diminished use of the haul-out site during the demolition and construction activities (Hanan & Associates, 2011).

The City of San Diego requests authorization for Level B harassment of three species of marine mammals (i.e., Pacific harbor seals, California sea lions, and northern elephant seals) incidental to the use of equipment and its propagation of in-air noise from various acoustic mechanisms associated with the demolition and construction activities of the Children's Pool Lifeguard Station at La Jolla, California discussed above. Several species of marine mammals may potentially occur in the specified geographic area and thus may be affected by the action. Pacific harbor seals are the most common species, the California sea lion and northern elephant seal are observed occasionally, and thus considered likely to be exposed to sound associated with the demolition and construction activities. Behavioral disturbance may potentially occur as well incidental to the visual presence of humans and demolition/construction activities; however, pinnipeds at this site have likely adapted or become acclimated to human presence at this site. Large numbers of people come to the site to view the pinnipeds at all hours and they perform many activities that can disturb pinnipeds at other sites, but this often does not occur at

Children's Pool as they seem to have acclimated to human presence and associated noises (e.g., nearby vehicles, overhead aircrafts, small boats, audio systems, dogs, human activities on foot, and human vocalizations) (Hanan & Associates, 2004; 2011). These "urbanized" harbor seals do not exhibit sensitivity at a level similar to that noted in harbor seals in some other regions affected by human disturbance (Allen *et al.*, 1984; Suryan and Harvey, 1999; Henry and Hammil, 2001; Johnson and Acevedo-Gutierrez, 2007; Jansen *et al.*, 2006; Hanan & Associates, 2011). Lifeguards at the Children's Pool and nearby areas estimate that an average of 1,556,184 people per year or 129,682 per month visit the site from 2010 to 2012. The vast majority of these visitors have come to the Children's Pool specifically to watch the harbor seals. A maximum of 15 personnel, at any one time, are expected to be part of the demolition and construction activities.

Current NMFS practice, regarding exposure of marine mammals to high-level in-air sounds, as a threshold for potential Level B harassment, is at or above 90 dB re 20  $\mu$ Pa for harbor seals and at or above 100 dB re 20  $\mu$ Pa for all other pinniped species (Lawson *et al.*, 2002; Southall *et al.*, 2007). NMFS does not expect exposure of marine mammals to high-level underwater sounds from demolition and construction activities that would be considered for potential Level B harassment. The acoustic mechanisms involved entail in-air non-impulsive noise caused by the demolition and construction activities. Expected in-air noise levels are anticipated to result in elevated sound intensities near the demolition and construction activities. No other mechanisms are expected to affect marine mammal use of the area. The other activities, would not affect any haul-out and would not entail noise, and activity surrounding the water materially

different from normal operations at the lifeguard station, to which the animals may be somewhat habituated already.

Since no demolition or construction activities will be performed during the pupping and weaning season (i.e., mid-December through mid-May), there will be no impacts on birthing rates or pup survivorship at the Children's Pool. There will be no in-water demolition and construction activities in or near the water so pinniped activities in the water should not be affected. Additionally, pinnipeds utilizing the Children's Pool beach as a haul-out site are a very small portion of the species and/or stock populations and any impacts would have little effect at the species and/or stock population levels.

As noted above, current NMFS practice, regarding exposure of marine mammals to high-level in-air sounds, as a potential threshold for Level B harassment, is at or above 90 dB re 20  $\mu$ Pa for harbor seals and at or above 100 dB re 20  $\mu$ Pa for all other pinniped species. Pinnipeds at Children's Pool are likely already exposed to and habituated to loud noise and human presence, and thus may have areas of effect comparable to the radius of effect calculated for noise from the demolition and construction activities. Behavioral considerations suggest that the pinnipeds would be able to determine that a noise source does not constitute a threat if it is more than a certain distance away, and the sound levels involved are not high enough to result in injury (Level A harassment). Nonetheless, these data suggest that demolition and construction activities may affect pinniped behavior throughout the Children's Pool area, i.e., within approximately a few hundred feet of the activity. The nature of that effect is unpredictable, but logical responses on the part of the pinnipeds include tolerance (noise levels would likely not be

loud enough to induce temporary threshold shift in harbor seals), or avoidance by using haul-outs or by foraging outside of the immediate Children's Pool area.

In-Air Noise – The principal source of in-air noise would be from a 980 Case backhoe, dump truck, air compressor, electric screw guns, jackhammer, concrete saw, and chop saws used for the demolition and construction activities. Background noise levels near the Children's Pool are likely already elevated due to normal activities (e.g., human presence and traffic) and the ocean. There have been no studies conducted at the Children's Pool regarding background noise in the area, but the City of San Diego will conduct pre- and post-acoustic monitoring to determine ambient sound levels as well as noise-levels generated from the demolition and construction activities. Marine mammals at Children's Pool haul-outs are presumably tolerant and acclimated to the daily coming and going of humans, automobiles, and to other existing activities at the action area. These activities may occur at any time of the day for periods of up to several hours at a time.

Hanan & Associates (2004) noted that harbor seals hauled-out at the Children's Pool are exposed to the constant presence of humans (on the beach, sea wall, lifeguard tower, and sidewalks). There are so many human visitors to the Children's Pool site at all hours of the day and night, season, and weather that human scent and visual presence are generally not considered issues (Hanan, 2004; 2011). At this site, the Pacific harbor seals are most disturbed when people get very close to them on the beach (i.e., probably 2 to 3 m [6.6 to 9.8 ft]). However, the City of San Diego wants to be authorized for incidental take coverage in case pinnipeds alert to the novel presence or sounds of equipment not

previously experienced by pinnipeds at this location. The contractors will not directly approach the Pacific harbor seals during the demolition and construction activities.

At the individual level, a newly arrived pinniped (moved in from another area) may not have acclimated to humans and noise as pinnipeds that have been on site for awhile. These recent arrivals may alert to these stimuli, perhaps flushing into the water. However, after a few days of using the beach at Children's Pool, the City of San Diego would expect the pinnipeds to acclimate and not react to humans (unless close to them) or noises at the demolition and construction activities site. Observations have shown that loud and startling noises have consistently caused some of the harbor seals at the site to flush into the water, and generally the harbor seals returned to the haul-out site within a short time (Hanan & Associates, 2002; Yochem, 2004; Hanan & Associates, 2011).

Although harbor seals could also be affected by in-air noise and activity associated with demolition and construction at the lifeguard station, harbor seals at Children's Pool haul-outs are presumably acclimated to human activity to some extent due to the daily coming and going (i.e., presence) of humans, and to other existing activities in the area. These activities may occur at any time of the day and may produce noise for periods of up to several hours at a time. The operation of loud equipment are above and outside of the range of normal activity at the Children's Pool and have the potential to cause seals to leave a haul-out at the Children's Pool. This would constitute Level B harassment (behavioral). In view of the relatively small area that would be affected by elevated in-air noise and the proximity to the haul-out sites, it appears probable that some harbor seals could show a behavioral response, despite their tolerance

to current levels of human-generated noise; incidental take by this mechanism may occur during the demolition and construction activities.

Harbor seal presence in the activity area is perennial, with daily presence at a nearby haul-out (Seal Rock is several hundred yards east of the Children's Pool site) during the months when the activity would occur. The potentially affected harbor seals include adults of both sexes. The harbor seals at Children's Pool may be non-migratory residents, exhibiting site fidelity at the haul-out sites. Harbor seals often stay within a 50 km (31.1 miles) range of haul-outs, but young individuals and adult males have lower site fidelity and dispersal rates. Adult females are known to mate and give birth in the area where they were born (i.e., high degree of natal philopatry) (Harkonen and Harding, 2001; Linder, 2011). Cannon (2009) documented individuals moving between haul-out sites at Las Islas Coronados, Mexico and the Children's Pool, which are located approximately 50 km apart (Linder, 2011). However, it is possible that at least some of the harbor seals using this site come from moderate distances, as they are known to travel distances up to approximately 550 km (297 nmi) for foraging or mating purposes (Herder, 1986; Linder, 2011; Hanan & Associates, 2011). A study by Greenslade (2002) on diet and foraging ecology suggests that the harbor seals at Children's Pool travel some distance away from the haul-out site to feed, as the main prey species in their diet (i.e., Pacific sanddab and Pacific hake) do not occur in the kelp forest near the La Jolla area (Linder, 2011).

Although harbor seals are tolerant to the presence of humans and other visible and non-visible disturbances, they may display a range of behaviors when exposed to noise from demolition and construction activities. Using the webcam, WAN has documented

that when major flushing events occur it can take a day or two for them to return in the same numbers. Videos of these events can be found online at:

<http://www.youtube.com/watch?v=UWH3z2iP1Ms&Feature=youtu.be> and  
<http://www.youtube.com/watch?v=VRQyn6IOUxY>.

It is likely that many harbor seals in the “urbanized” population would be affected more than once over the course of the demolition and construction period; therefore, it is possible that some measure of adaptation or acclimatization would occur on the part of the harbor seals, whereby they would tolerate elevated noise levels and/or utilize haul-outs relatively distant from the demolition and construction activities. This strategy is possible, but it is difficult to predict whether the harbor seals would show such a response. Project scheduling avoids the most sensitive breeding phases of harbor seals. Project activities producing in-air noise would commence in June, after pupping season and when pups have been weaned. Project activities producing in-air noise are scheduled to terminate by the middle of December, which is before adult female harbor seals begin pupping. Visibly pregnant females may begin using this site in November, and perhaps as early as October.

Effects on California Sea Lions and Northern Elephant Seals – California sea lions and northern elephant seals, although abundant in northern California waters, have seldom been recorded at the Children’s Pool. Their low abundance in the area may be due to the presence of a large and active harbor seal population there, which likely competes with the California sea lions and northern elephant seals for foraging resources. Any California sea lions that visit the action area during construction activities would be subject to the same type of impacts described above for harbor seals. There is a



possibility of behavioral effects related to project acoustic impacts, in the event of California sea lion and northern elephant seal presence in the activity area. California sea lions and northern elephant seals have been seen in the activity area, albeit infrequently, and there are no quantitative estimates of the frequency of their occurrence. Assuming that they are present, it is possible California sea lions and northern elephant seals might be subject to behavioral harassment.

The potential effects to marine mammals described in this section of the document do not take into consideration the monitoring and mitigation measures described later in this document (see the “Mitigation” and “Monitoring and Reporting” sections) which, as noted are designed to effect the least practicable adverse impact on affected marine mammal species or stocks.

#### Anticipated Effects on Marine Mammal Habitat

All demolition and construction activities are beyond or outside the habitat areas where harbor seals and other pinnipeds are found. Visual barriers will be erected to shield construction activities from the visual perception and potentially dampen acoustic effects on pinnipeds. Because the public occasionally harasses the harbor seals with various activities, the NMFS-qualified PSO monitoring the site will make observations and attempt to distinguish and attribute any observed harassment to the public or to the demolition and construction activities and give all details in the observation report. If any short-term, temporary impacts to habitat due to sounds or visual presence of equipment and workers did occur, the City of San Diego would expect pinniped behavior to return to pre-demolition and construction conditions soon after the activities are completed which is anticipated to occur before the next pupping season (Hanan &

Associates, 2011). This site is already very disturbed by member of the public who come to the area during the day and night to view the pinnipeds. The City of San Diego and NMFS do not project any loss or modification of physical habitat for these species. Any potential temporary loss or modification of habitat due to in-air noise or visual presence of equipment and workers during the activities is expected by the City of San Diego and NMFS to be quickly restored after demolition and construction activities end and all equipment and barriers are removed.

The anticipated adverse impacts upon habitat consist of temporary changes to the in-air acoustic environment, as detailed in the IHA application. These changes are minor, temporary, and of limited duration to the period of demolition and construction activities. No aspect of the project is anticipated to have any permanent effect on the location of pinniped haul-outs in the area, and no permanent change in seal or sea lion use of haul-outs and related habitat features is anticipated to occur as a result of the project (Hanan & Associates, 2011). The temporary impacts on the acoustic environment are not expected to have any permanent effects on the species or stock populations of marine mammals occurring at the Children's Pool. The area of habitat affected is small and the effects are temporary, thus there is no reason to expect any significant reduction in habitat available for foraging and other habitat uses.

NMFS anticipates that the action will result in no impacts to marine mammal habitat beyond rendering the areas immediately around the Children's Pool less desirable during demolition and construction activities of the Children's Pool Lifeguard Station as the impacts will be localized. Impacts to marine mammals, invertebrates, and fish species are not expected to be detrimental.

## Mitigation

In order to issue an ITA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

The City of San Diego has established the Children's Pool as a shared beach for pinnipeds and people. In the past, during the pupping season, a rope was placed along the upper part of the beach to designate how close people can come to the haul-out area. The timeframe for the rope has been extended so that it is now present year-round. The demolition and construction activities are planned to occur outside the harbor seal pupping and weaning periods. Visual and acoustic barriers will be constructed. The visual and acoustic barrier will be constructed of plywood, 1.8 to 2.4 m (6 to 8 ft) tall. The barriers will be placed at the site with input from NMFS Southwest Regional Office (SWRO) personnel so that they will hide as advantageously as possible the demolition and construction activities that may be seen by pinnipeds. The barriers may dampen the acoustic sound sources, but are not expected to exclude sound from the environment. As the site is a beach with construction along the cliff and on flat areas above the cliff, a complete barrier cannot likely be constructed to hide all demolition and construction activities for the project. Once the walls of the lifeguard station's building are in place, much of the demolition and construction activities will take place above the Children's Pool beach (i.e., out of sight) as well as inside the building (i.e., a visual and partial sound barrier). There will be no activities in the ocean or closer to the water's edge and since

harbor seals mate underwater in the ocean, there will be no impacts on mating activities. California sea lions and northern elephant seals are such infrequent users of this area and their rookeries are so far away (at least 104.6 km [65 miles] at offshore islands) that there will be no adverse impact on these species.

Since the notice of the proposed IHA (78 FR 25958, May 3, 2013), NMFS has modified several of the monitoring and mitigation measures included in the proposed IHA for practicability reasons, as well as included several additional measures. These include changing the pupping season from December 15<sup>th</sup> to May 15<sup>th</sup> and prohibiting demolition and construction activities during this time; extending demolition and construction activities from 7 a.m. to 7 p.m. to help assure that the project is completed during the 2013 demolition and construction window; continuing monitoring for 60 days following the end of demolition and construction activities; and triggering a shut-down of demolition and construction activities in the unexpected event of abandonment of the Children's Pool site. The mitigation measure on scheduling the heaviest demolition and construction activities (with the highest sound levels) during the annual period of lowest haul-out occurrence (October to November) was removed as it was included in the City of San Diego's Mitigated Negative Declaration when it was anticipated that the City of San Diego would obtain an IHA in the summer of 2012 and begin demolition and construction activities in the fall of 2012. This is no longer practicable due to logistics, scheduling and to allow the planned activities to be completed before the next pupping season.

The activity planned by the applicant includes a variety of measures calculated to minimize potential impacts on marine mammals, including:

- Construction shall be prohibited during the Pacific harbor seal pupping season (December 15<sup>th</sup> to May 15<sup>th</sup> ) and for an additional four weeks to accommodate lactation and weaning of late season pups. Thus, construction shall be prohibited from December 15<sup>th</sup> to June 1<sup>st</sup>.
- Demolition and construction activities shall be scheduled, to the maximum extent practicable, during the daily period of lowest haul-out occurrence, from approximately 8:30 a.m. to 3:30 p.m.; however, demolition and construction activities may be extended from 7 a.m. to 7 p.m. to help assure that the project can be completed during the 2013 demolition and construction window. Harbor seals typically have the highest daily or hourly haul-out period during the afternoon from 3 p.m to 6 p.m.
- A visual and acoustic barrier will be erected and maintained for the duration of the project to shield demolition and construction activities from beach view. The temporary barrier shall consist of 1/2 to 3/4 inch (1.3 to 1.9 centimeters [cm]) plywood constructed 1.8 to 2.4 m (6 to 8 ft) high depending on the location.
- Use of trained PSOs to detect, document, and minimize impacts (i.e., possible shut-down of noise-generating operations [turning off the equipment so that in-air sounds associated with construction no longer exceed levels that are potentially harmful to marine mammals]) to marine mammals.

#### Timing Constraints for In-Air Noise

To minimize in-air noise impacts on marine mammals, underwater construction activities shall be limited to the period when the species of concern will be least likely to be in the project area. The construction window for demolition and construction activities shall be from June 1 to December 15, 2013. The IHA may extend through June

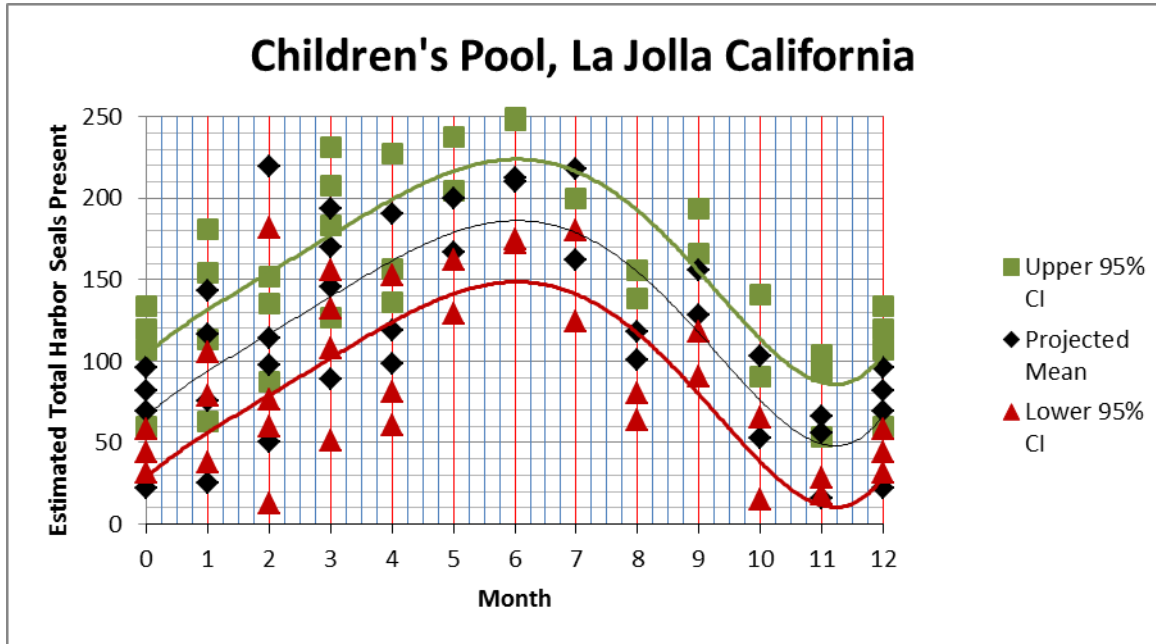
of 2014 to finish the demolition and construction activities if needed. Avoiding periods when the highest number of marine mammal individuals are in the action area is another mitigation measure to protect marine mammals from demolition and construction activities.

### Abandonment

After the first two months of monitoring during demolition and construction activities, the City of San Diego will take the mean number of observed harbor seals at the Children's Pool in a 24-hour period across that two months and compare it to the mean of the lower 95 percent confidence interval in Figure 1 (see below). If the observed mean is lower, the City of San Diego will shut-down demolition and construction activities and work with NMFS and other harbor seal experts (e.g., Mark Lowry, Dr. Sarah Allen, Dr. Pamela Yochem, and/or Dr. Brent Stewart) to develop and implement a revised mitigation plan to further reduce the number of takes and potential impacts. Once a week every week thereafter, the City of San Diego will take the same mean of observed harbor seals across the previous three tide cycles (a tide cycle is approximately 2 weeks) and compare it to the 95% lower confidence interval in Figure 1 for the same time period. If the observed mean is lower, the City of San Diego will shut-down and take the action described above. If abandonment of the site is likely, monitoring will be expanded away from the Children's Pool to determine if animals have been temporarily displaced to haul-out sites in the southern California area (e.g., Torrey Pines, Point Loma, etc.). For the purpose of this action, NMFS will consider the Children's Pool site to possibly be abandoned if zero harbor seals are present each day during the daytime and nighttime hours for at least three tide cycles (a tide cycle is approximately 2 weeks), but this cannot

be confirmed until observed to continue to be zero during a full pupping and molting season.

Figure 1. Estimated total harbor seals by month based on counts at the site by Hanan & Associates, Yochem and Stewart, and Children's Pool docents. The polynomial curve fits to counts by months, which includes the projected mean as well as the upper 95% and lower 95% confidence intervals, was used to estimate harbor seals expected to be hauled-out by day.





More information regarding the City of San Diego's monitoring and mitigation measures, for the demolition and construction activities at the Children's Pool Lifeguard Station can be found in the IHA application.

NMFS has carefully evaluated the applicant's mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. NMFS's evaluation of potential measures included consideration of the following factors in relation in one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation, including consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the activity.

NMFS has determined that the mitigation measures will have the least practicable adverse impact on the species or stocks of marine mammals in the action area.

#### Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary

monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

The City of San Diego has developed a monitoring plan (see Appendix I. Mitigated Negative Declaration in the IHA application) based on discussions between the project biologist, Dr. Doyle Hanan, and NMFS biologists. The plan has been vetted by City of San Diego planners and reviewers. The plan has been formal presented to the public for review and comment. The City of San Diego has responded in writing and in public testimony (see City of Council Hearing, December 14, 2011) to all public concerns.

The basic plan is to survey prior to construction activities and then monitor demolition and construction activities by NMFS-approved PSOs with high-resolution binoculars and handheld digital sound level meters (measuring devices). PSOs will observe from a station along the breakwater wall as well as the base of the cliff below the demolition/construction area. PSOs will be on site approximately 30 minutes before the start of demolition and construction activities and continue for 30 minutes after activities have ceased. Monitors will have authority to stop construction as necessary depending on sound levels, pinniped presence, and distance from sound sources. Daily monitoring reports will be maintained for periodic summary reports to the City of San Diego and to NMFS. Observations will be entered into maintained Hanan & Associates computers. The City of San Diego plans to follow the reporting in the Mitigated Negative Declaration that states “the biologist shall document field activity via the Consultant Site Visit Record. The Consultant Site Visit Record shall be either emailed or faxed to the

City of San Diego's Mitigation Monitoring Coordination process (MMC) on the 1<sup>st</sup> day of monitoring, the 1<sup>st</sup> week of each month, the last day of monitoring, and immediately in the case of any undocumented discovery. The project biologist shall submit a final construction monitoring report to MMC within 30 days of construction completion." The MMC "coordinates the monitoring of development projects and requires that changes are approved and implemented to be in conformance with the permit requirements and to minimize any damage to the environment." These documents will also be sent to NMFS.

The City of San Diego will include sound measurements at and near the demolition and construction site in their initial survey prior to the activities as a background and baseline for the project. While no specific acoustic study is planned, the City of San Diego's Mitigated Negative Declaration states that marine mammal monitoring shall be conducted for three to five days prior to construction and shall include hourly systematic counts of pinnipeds using the beach, Seal Rock, and associated reef areas. Monitoring three to five days prior to construction will provide baseline data regarding recent haul-out behavior and patterns as well as background noise levels near the time of demolition and construction activities. The City of San Diego has modified its monitoring program to include 60 days of monitoring post-demolition and construction activities. Following demolition and construction, the City of San Diego will have a program of onsite PSOs that will randomly select a day per week integrated with 10 randomly selected 30 minute monitoring periods using the WAN webcam on three non-observed days via their computers when the WAN webcam is working. During the demolition and construction activities, monitoring shall assess behavior and potential behavioral responses to demolition and construction noise and activities. Visual digital

recordings and photographs shall be used to document individuals and behavioral responses to demolition and construction. The City of San Diego plan to make hourly counts of the number of pinnipeds present and record sound or visual events that result in behavioral responses and changes, whether during construction or from public stimuli. During these events, pictures and video will also be taken when possible. The “Mitigated Negative Declaration” states “monitoring shall assess behavior and potential behavioral responses to construction noise and activities. Visual digital recordings and photographs shall be used to document individuals and behavioral responses to construction.”

The City of San Diego is open to working with the WAN’s La Jolla Harbor Seal Webcam, which can be found online at: [http://www.wanconservancy.org/la\\_jolla\\_harbor\\_seal\\_earthcam.htm](http://www.wanconservancy.org/la_jolla_harbor_seal_earthcam.htm). The City of San Diego may do periodic checks using the webcam for monitoring purposes. The camera is not expected to replace NMFS-qualified PSOs at the site making accurate counts, measuring sound levels and observing the public and the construction, as well as the harbor seals. In the camera view, you may be able to see visual evidence of Level B harassment, but it probably would not be able to be distinguished between harassment from demolition and construction activities and the public since the camera has a limited scope and only shows the Children’s Pool beach and pinnipeds (usually a specific portion of the beach, but not the reef nor nearby beaches).

Consistent with NMFS procedures, the following marine mammal monitoring and reporting shall be performed for the action:

(1) A NMFS-approved or -qualified PSO shall attend the project site prior to, during, and after construction activities cease each day throughout the demolition and construction window.

(2) The PSO shall be approved by NMFS prior to demolition and construction activities.

(3) The PSO shall search for marine mammals within the Children's Pool area.

(4) The PSO shall be present during demolition and construction activities to observe for the presence of marine mammals in the vicinity of the specified activity. All such activity will occur during daylight hours (i.e., 30 minutes after sunrise and 30 minutes before sunset). If inclement weather limits visibility within the area of effect, the PSO will perform visual scans to the extent conditions allow

(5) If marine mammals are sighted by the PSO within the acoustic thresholds areas, the PSO shall record the number of marine mammals within the area of effect and the duration of their presence while the noise-generating activity is occurring. The PSO will also note whether the marine mammals appeared to respond to the noise and if so, the nature of that response. The PSO shall record the following information: date and time of initial sighting, tidal stage, weather conditions, Beaufort sea state, species, behavior (activity, group cohesiveness, direction and speed of travel, etc.), number, group composition, distance to sound source, number of animals impacted, demolition/construction activities occurring at time of sighting, and monitoring and mitigation measures implemented (or not implemented). The observations will be reported to NMFS.

(6) A final report will be submitted summarizing all in-air demolition and construction activities and marine mammal monitoring during the time of the authorization, and any long term impacts from the project.

A written log of dates and times of monitoring activity will be kept. The log shall report the following information:

- Time of observer arrival on site;
- Time of the commencement of in-air noise generating activities, and description of the activities;
- Distances to all marine mammals relative to the sound source;
- For harbor seal observations, notes on seal behavior during noise-generating activity, as described above, and on the number and distribution of seals observed in the project vicinity;
- For observations of all marine mammals other than harbor seals, the time and duration of each animal's presence in the project vicinity; the number of animals observed; the behavior of each animal, including any response to noise-generating activities;
- Time of the cessation of in-air noise generating activities; and
- Time of observer departure from site.

All monitoring data collected during demolition and construction will be included in the biological monitoring notes to be submitted. A final report summarizing the demolition and construction monitoring and any general trends observed will also be submitted to NMFS within 90 days after monitoring has ended during the period of the lifeguard station demolition and construction.

The City of San Diego would notify NMFS Headquarters and the NMFS Southwest Regional Office prior to initiation of the demolition and construction activities. A draft final report must be submitted to NMFS within 90 days after the conclusion of the demolition and construction activities of the Children's Pool Lifeguard Station. The report would include a summary of the information gathered pursuant to the monitoring requirements set forth in the IHA, including dates and times of operations, and all marine mammal sightings (dates, times, locations, species, behavioral observations [activity, group cohesiveness, direction and speed of travel, etc.], tidal stage, weather conditions, Beaufort sea state and wind force, activities, associated demolition and construction activities). A final report must be submitted to the Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report would be considered to be the final report.

While the IHA would not authorize injury (i.e., Level A harassment), serious injury, or mortality, should the applicant, contractor, monitor or any other individual associated with the demolition and construction project observe an injured or dead marine mammal, the incident (regardless of cause) will be reported to NMFS as soon as practicable. The report should include species or description of animal, condition of animal, location, time first found, observed behaviors (if alive) and photo or video, if available.

In the unanticipated event that the City of San Diego discovers a live stranded marine mammal (sick and/or injured) at Children's Pool, they shall immediately contact Sea World's stranded animal hotline at 1-800-541-7235. Sea World shall also be notified

for dead stranded pinnipeds so that a necropsy can be performed. In all cases, NMFS shall be notified as well, but for immediate response purposes, Sea World shall be contacted first.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury or mortality, the City of San Diego shall immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301-427-8401 and/or by email to [Jolie.Harrison@noaa.gov](mailto:Jolie.Harrison@noaa.gov) and [Howard.Goldstein@noaa.gov](mailto:Howard.Goldstein@noaa.gov) and the Southwest Regional Stranding Coordinator ([Sarah.Wilkin@noaa.gov](mailto:Sarah.Wilkin@noaa.gov)). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- The type of activity involved;
- Description of the circumstances during and leading up to the incident;
- Status of all sound source use in the 24 hours preceding the incident; water depth; environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of marine mammal observations in the 24 hours preceding the incident; species identification or description of the animal(s) involved;
- The fate of the animal(s); and photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with the City of San Diego to determine what is



necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The City of San Diego may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that the City of San Diego discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), the City of San Diego will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301-427-8401, and/or by email to [Jolie.Harrison@noaa.gov](mailto:Jolie.Harrison@noaa.gov) and [Howard.Goldstein@noaa.gov](mailto:Howard.Goldstein@noaa.gov), and the NMFS Southwest Regional Office (562-980-4017) and/or by email to the Southwest Regional Stranding Coordinator ([Sarah.Wilkin@noaa.gov](mailto:Sarah.Wilkin@noaa.gov)). The report must include the same information identified above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the City of San Diego to determine whether modifications in the activities are appropriate.

In the event that the City of San Diego discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the City of San Diego shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301-427-8401, and/or by email to [Jolie.Harrison@noaa.gov](mailto:Jolie.Harrison@noaa.gov) and [Howard.Goldstein@noaa.gov](mailto:Howard.Goldstein@noaa.gov), and the NMFS Southwest Regional Office (562-980-4017) and/or by email to the Southwest Regional Stranding

Coordinator ([Sarah.Wilkin@noaa.gov](mailto:Sarah.Wilkin@noaa.gov)), within 24 hours of the discovery. The City of San Diego shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

#### Estimated Take by Incidental Harassment

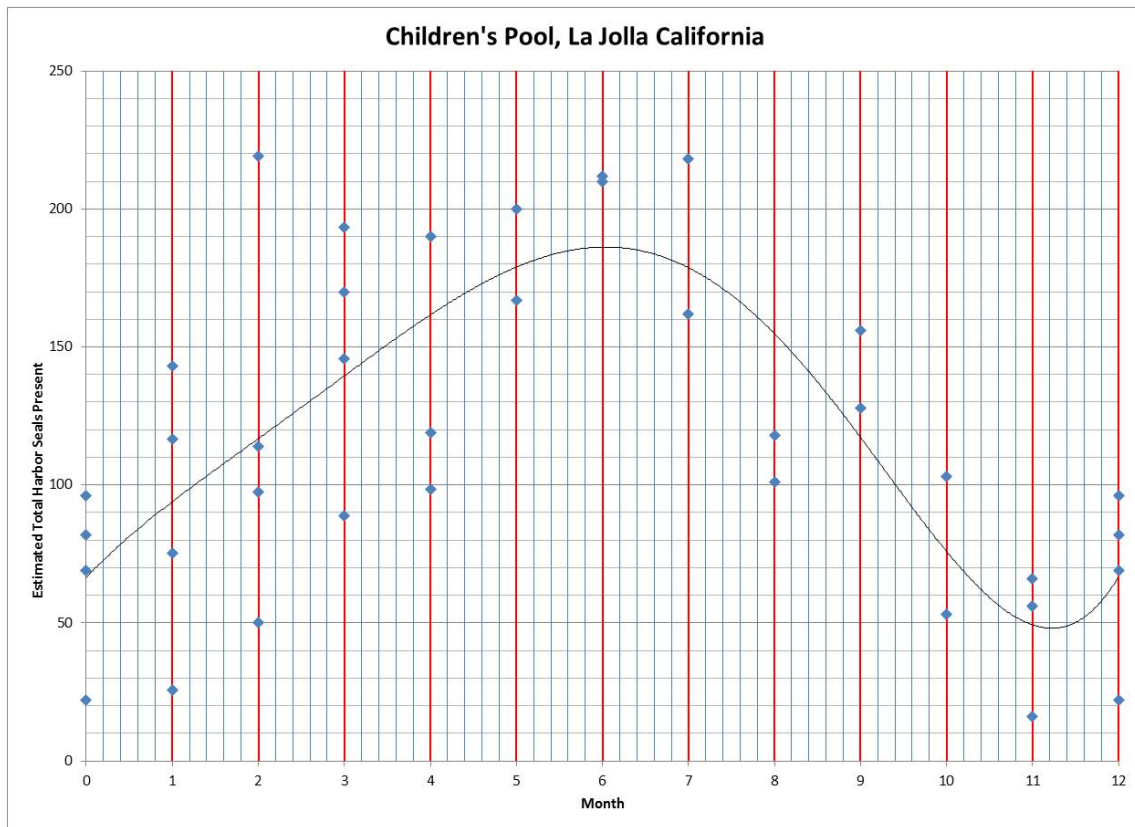
Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

The City of San Diego and NMFS anticipate takes of Pacific harbor seals, California sea lions, and northern elephant seals by Level B (behavioral) harassment only incidental to the project at the Children’s Pool. No takes by injury (Level A harassment), serious injury, or mortality is expected. There is a high likelihood that many of the harbor seals present during the demolition and construction activities will not be flushed off of the beach or rocks, as pinnipeds at this site are conditioned to human presence and loud noises (Hanan, 2004; 2011) (see <http://www.youtube.com/watch?v=4IRUYVTULsg>).

With demolition and construction activities scheduled to begin in June 2013, the City of San Diego expects a range of 0 to 190 harbor seals to be present daily during June and a seasonal decline through November to about 0 to 50 harbor seals present daily. If all of the estimated harbor seals present are taken by incidental harassment each day,

there could be a maximum of 12,783 takes (i.e., approximately 3,579 adult males and 2,684 juvenile males, 3,451 adult females and 2,429 juvenile females based on age and sex ratios presented in Harkonen et al., 1999) over the entire duration of the demolition and construction activities. The City of San Diego expects about 90% of the adult females to be pregnant after June and July (Greig, 2002). An unknown portion of the incidental takes would be from repeated exposures as harbor seals leave and return to the Children's Pool area. A polynomial curve fit to counts by month was used by the City of San Diego to estimate the number of harbor seals expected to be hauled-out by day (see below and Figure 1 of the IHA application).

Figure 2. Estimated total harbor seals by month based on counts at the site by Hanan & Associates, Yochem and Stewart, and Children's Pool docents. The polynomial curve fits to counts by months was used to estimate harbor seals expected to be hauled-out by day.



Assuming the total seals predicted to haul-out daily at the Children's Pool are exposed to sound levels that are considered Level B harassment during days where sound is predicted to exceed 90 dB at the demolition/construction site (106 days), there could be a maximum of approximately 12,783 incidental takes (i.e., exposures) of approximately up to 600 individual Pacific harbor seals over the duration of the activities. The estimated 600 individual Pacific harbor seals will be taken by Level B harassment multiple times during the demolition and construction activities. Very few California sea lions and/or northern elephant seals are ever observed at the Children's Pool (i.e., one or two individuals). The City of San Diego requests the authority to incidentally take (i.e., exposures) 12,783 Pacific harbor seals, 100 California sea lions, and 25 northern elephant seals of 600, 2, and 1 individual, respectively. More information on the number of requested authorized takes, estimated number of individuals, and the approximate percentage of the stock for the three species in the action area can be found in Table 2 (below).

NMFS will consider pinnipeds flushing into the water; moving more than 1 m (3.3 ft), but not into the water; becoming alert and moving, but do not moving more than 1 m; and changing direction of current movement by individuals as behavioral criteria for take by Level B harassment. The City of San Diego will estimate the portion of pinnipeds present that are observed to exhibit these behaviors as well as the apparent source of the stimulus (i.e., if it is from human presence, demolition and construction activities, or other).

Table 2. Summary of the anticipated incidental take by Level B harassment of pinnipeds for the City of San Diego's demolition and construction activities generating in-air noise at the Children's Pool Lifeguard Station in La Jolla, California.

Species	Requested Take Authorization (Number of Exposures)	Estimated Number of Individuals Taken	Approximate Percentage of Estimated Stock (Individuals)
Pacific harbor seal	12,783	600	1.98
California sea lion	100	2	<0.01
Northern elephant seal	25	1	<0.01

#### Encouraging and Coordinating Research

Each demolition/construction phase and potential harassment activity will be evaluated as to observed sound levels and any pinniped reaction by type of sound source. Flushing will be documented by sex and age class. These data will provide instructional for IHA permitting in future projects. Potential mitigation will be discussed and suggested in the final report. NMFS has encouraged the City of San Diego to work with WAN to review and analyze any available data to determine baseline information as well as evaluate the impacts from the demolition and construction activities on the pinnipeds at the Children's Pool. The City of San Diego is open to working with the WAN's La Jolla Harbor Seal Webcam, which can be found online at:

[http://www.wanconservancy.org/la\\_jolla\\_harbor\\_seal\\_earthcam.htm](http://www.wanconservancy.org/la_jolla_harbor_seal_earthcam.htm). The City of San Diego may do periodic checks using the webcam for monitoring purposes.

#### Negligible Impact and Small Numbers Analyses and Determinations

As a preliminary matter, NMFS typically includes our negligible impact and small numbers analyses and determinations under the same section heading of our Federal Register notices. Despite co-locating these terms, NMFS acknowledges that negligible impact and small numbers are distinct standards under the MMPA and treat them as such.

The analyses presented below do not conflate the two standards; instead, each standard has been considered independently and NMFS has applied the relevant factors to inform our negligible impact and small numbers determinations.

NMFS has defined “negligible impact” in 50 CFR 216.103 as “...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”

In making a negligible impact determination, NMFS evaluated factors such as:

- (1) The number of anticipated injuries, serious injuries, or mortalities;
- (2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited); and
- (3) The context in which the takes occur (i.e., impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);
- (4) The status of stock or species of marine mammals (i.e., depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);
- (5) Impacts on habitat affecting rates of recruitment/survival; and
- (6) The effectiveness of monitoring and mitigation measures.

No injuries (Level A harassment), serious injuries, or mortalities are anticipated to occur as a result of the City of San Diego’s demolition and construction activities, and none are authorized by NMFS. The activities are not expected to result in the alteration of reproductive behaviors, and the potentially affected species would be subjected to temporary only to temporary and minor behavioral impacts.

As discussed in detail above, the project scheduling avoids sensitive life stages for Pacific harbor seals. Project activities producing in-air noise would commence in June and end by December 15<sup>th</sup>. June is after the end of the pupping season and affords additional time to accommodate lactation and weaning of season pups as well as considers periods of lowest haul-out occurrence. The December 15<sup>th</sup> end date should provide more protection for the pregnant and nursing harbor seals in case they give birth before January 1<sup>st</sup>; however, most births occur after the beginning of January. Table 2 of this document outlines the number of requested Level B harassment takes that are anticipated as a result of these activities. Due to the nature, degree, and context of Level B (behavioral) harassment anticipated and described (see “Potential Effects on Marine Mammals” section above) in this notice, this activity is not expected to impact rates of annual recruitment or survival for the affected species or stock (i.e., California stock of Pacific harbor seals, U.S. stock of California sea lions, and California breeding stock of northern elephant seals), particularly given the NMFS and the applicant’s plan to implement required mitigation, monitoring, and reporting measures to minimize impacts to marine mammals.

For the other marine mammal species that may occur within the action area, there are no known designated or important feeding and/or reproductive areas. Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (i.e., 24 hour cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall et al., 2007). However, for many years Pacific harbor seals have been hauling-out at



Children's Pool during the year (including during pupping season and while females are pregnant) and have been exposed to anthropogenic sound sources such as vehicle traffic, human voices, etc. and are frequently exposed to stimuli from human presence. While studies have shown the types of sound sources used during the demolition and construction activities have the potential to displace marine mammals from breeding areas for a prolonged period (e.g., Lusseau and Bejder, 2007; Weilgart, 2007), based on the best available information, this does not seem to be the case for the Pacific harbor seals at the Children's Pool. Over many years, the Pacific harbor seals have repeatedly hauled-out to pup and overall the NMFS Stock Assessment Reports (NMFS, 2011) for this stock have shown that the population is increasing and is considered stable. Additionally, the demolition and construction activities will be increasing sound levels in the environment in a relatively small area surrounding the lifeguard station (compared to the range of the animals), and some animals may only be exposed to and harassed by sound for less than a day.

Of the 3 marine mammal species under NMFS jurisdiction that may or are known to likely occur in the action area, none are listed as threatened or endangered under the ESA. No incidental take has been requested to be authorized for ESA-listed species as none are expected to be within the action area. There is generally insufficient data to determine population trends for the other depleted species in the study area. To protect these animals (and other marine mammals in the action area), the City of San Diego must prohibit demolition and construction activities during harbor seal pupping season; scheduling demolition and construction activities with highest sound levels during the annual period of lowest haul-out occurrence and during the daily period of lowest haul-

out occurrence; limiting activities to the hours of daylight; erecting a temporary visual and acoustic barrier; and using PSOs. No injury, serious injury, or mortality is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, and the activity is not expected to impact rates of recruitment or survival.

As mentioned previously, NMFS estimates that 3 species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. It is estimated that up to 600 individual Pacific harbor seals, 2 individual California sea lions, and 1 northern elephant seal will be taken (multiple times) by Level B harassment, which would be approximately 1.98, less than 0.01, and less than 0.01 of the respective California, U.S., and California breeding stocks. The population estimates for the marine mammal species that may be taken by Level B harassment were provided in Table 2 of this document. NMFS's practice has been to apply the 90 dB re 20  $\mu$ Pa and 100 dB re 20  $\mu$ Pa received level threshold for in-air sound levels to determine whether take by Level B harassment occurs. Southall et al. (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall et al. [2007]). NMFS has not established a threshold for Level A harassment (injury) for marine mammals exposed to in-air noise, however, Southall et al. (2007) recommends 149 dB re 20  $\mu$ Pa (peak flat) as the potential threshold for injury from in-air noise for all pinnipeds. No in-air sounds from demolition and construction activities will exceed 110 dB at the source.

While behavioral modifications, including temporarily vacating the area during the demolition and construction activities, may be made by these species to avoid the

resultant acoustic disturbance, the availability of alternate areas within these areas for species and the short and sporadic duration of the activities, have led NMFS to determine that the taking by Level B harassment from the specified activity will have a negligible impact on the affected species in the specified geographic region. NMFS believes that the time period of the demolition and construction activities, the requirement to implement mitigation measures (e.g., prohibiting demolition and construction activities during pupping season, scheduling operations to periods of the lowest haul-out occurrence, visual and acoustic barriers, and the addition of a new measure that helps protect against unexpected abandonment of the site), and the inclusion of the monitoring and reporting measures, will reduce the amount and severity of the potential impacts from the activity to the degree that will have a negligible impact on the species or stocks in the action area.

NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of the demolition and construction activities at the Children's Pool Lifeguard Station in La Jolla, California, June to December 2013, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals. See Table 2 for the requested authorized take numbers of marine mammals.

#### Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Section 101(a)(5)(D) of the MMPA also requires NMFS to determine that the authorization will not have an unmitigable adverse effect on the availability of marine mammal species or stocks for subsistence use. There are no relevant subsistence uses of

marine mammals in the study area (off of southern California in the northeast Pacific Ocean) that implicate MMPA section 101(a)(5)(D).

#### Endangered Species Act

NMFS (Permits and Conservation Division) has determined that a section 7 consultation for the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity is not necessary for any ESA-listed marine mammal species under its jurisdiction as the action will not affect ESA-listed species.

#### National Environmental Policy Act

For consistency with regulations published by the Council of Environmental Quality (CEQ) and NOAA Administrative Order 216-6, Environmental Review Procedures for Implementing the National Environmental Policy Act, NMFS prepared an EA titled “Environmental Assessment on the Issuance of an Incidental Harassment Authorization to the City of San Diego to Take Marine Mammals by Harassment Incidental to Demolition and Construction Activities at the Children’s Pool Lifeguard Station in La Jolla, California.” After considering the EA, the information in the IHA application, and the Federal Register notice, as well as public comments, NMFS has determined that the issuance of the IHA is not likely to result in significant impacts on the human environment and has prepared a Finding of No Significant Impact (FONSI). An Environmental Impact Statement is not required and will not be prepared for the action.

## Authorization

NMFS has issued an IHA to the City of San Diego for the take, by Level B harassment, of small numbers of marine mammals incidental to demolition and construction activities at the Children's Pool Lifeguard Station in La Jolla, California, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 2, 2013.

---

Helen M. Golde,  
Deputy Director,  
Office of Protected Resources,  
National Marine Fisheries Service.

[FR Doc. 2013-16263 Filed 07/05/2013 at 8:45 am; Publication Date: 07/08/2013]